SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	3-6
Constitutional Provisions Involved	6-7
Statutes Involved	7
Questions Presented	7-10
Statement	9-18
The Questions Are Substantial	19
1. The Financial Impact on Locally Assessed Taxpayers and State and Local Government Is Pervasively Important	21-23
2. The Arbitrary Judicial Value Findings Below Conflict With Due Process Standards of Judicial Action as Defined by This Court	24-28
3. Arbitrary Use by State Judiciaries of Administrative Deflationary "Judgment Factors" in Constitutional Value Finding Impends Throughout the United States as the Railroads Seek to Obtain Judicial Relief From Property Tax Burdens and at the Same Time a Judicially Created Property Tax Preference for Themselves	29-39
4. Arbitrary State Judicial Action Finding Railroad Values While Enforcing Constitutional Mandates for Property Tax Purposes Portends Curtailment of State Administrative Processes	39-41
5. Congressional Action as Well as Constitutional Duty Impels Plenary Consideration	41
6. The Judgments Below Conflict With Two Recent Equal Protection Decisions of This Court; These Two Recent Decisions Are in Conflict With a 1940 Decision of This Court; at Least Two State Court and Two District Court Decisions Are Also in Conflict With the 1940 Decision	42-45
Conclusion	45-46

Appendix A: Opinion of the Supreme Court of Illinois ..... A 1-15
Appendix B: Opinion and Judgment Form of the Circuit Court of Madison County ..... A 16-44
Appendix C: Prototype of Judgment Below of Supreme Court of Illinois ..... A 45
Appendix D: Statutory Duties of Director of Revenue ..... A 46-50
Appendix F: Graph ..... A 51
Appendix E: Valuation Data ..... A 52
Appendix G: Opinion of Federal District Judge William E. Miller in L. & N. Rr. Co. v. Pub. Service Com. et al., Civ. No. 4310, M. D. Tenn., February 1, 1966 ..... A 53-71

CITATIONS.

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United States Supreme Court:

Adamson v. California, 322 U. S. 46, 48 (1947) .. 5
Alaska v. American Can Co., 353 U. S. 224 (1959) 18
Baker v. Carr, 369 U. S. 186 (1962) 38
Braniff Airways v. Neb. State Bd., 347 U. S. 590, 598-9 (1954) 18
Brinkerhoff-Faris Tr. Co. v. Hill, 281 U. S. 673, 677-8 (1930) 18
Brown v. Board of Education, 347 U. S. 483 (1954) 38
Brown Shoe Co. v. U. S., 370 U. S. 294, 305-11 (1962) 6
Burrows v. Jackson, 346 U. S. 294, 257 (1953) .. 40
Carondolet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 372-3 (1914) 6
Chicago v. Willett Co., 341 U. S. 913 (1951) (per curiam) 21
Cumberland Coal Co. v. Board, 284 U. S. 23 (1931) 5, 38, 42

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 289 (1921) 5
Flournoy v. Weiner, 321 U. S. 253, 263 (1944).. 2
Fiske v. Kansas, 274 U. S. 380, 385-6 (1927).....5, 39
Galveston, H. O. Rr. Co. v. Texas, 210 U. S. 217, 227 (1908)) 38
Garner v. Louisiana, 368 U. S. 157, 163, 170-4 (1961) 5, 24
Gillespie v. U. S. Steel, 379 U. S. 148, 152, 154 (1964) 6
Great Northern Rr. Co. v. Sunburst Oil Co., 287 U. S. 358, 366-7 (1932)..... 18
Hillsborough Township v. Cromwell, 326 U. S. 620 (1945) 6, 39, 43
Jennings v. Illinois, 342 U. S. 104 (1951)..... 21
Johnson v. Muellberger, 340 U. S. 581, 583 (1951) 6
Keokuk Bridge Co. v. Salim, 258 U. S. 122, 124-5 (1918) 4
King Mfg. Co. v. City Council, 277 U. S. 100 (1927)..... 5
Lindheimer v. Ill. Bell Tel. Co., 293 U. S. 151, 155 (1934) 6, 39
Mental Hygiene Dept. v. Kirchner, 380 U. S. 194, 196 (1965) 21
Minnesota v. National Tea Co., 309 U. S. 551, 555-7 (1940) 21
Minnesota Rate Cases, 230 U. S. 352, 465-66 (1913) 5, 24, 28
Napue v. Illinois, 360 U. S. 264, 271-2 (1958)....6, 39
Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362 (1940) 44, 45
New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 67 (1928) 18
Northern Pac. Rr. Co. v. North Dakota, 236 U. S. 585, 593 (1941) 6, 39
Prudential Ins. Co. v. Cheek, 259 U. S. 530, 547 (1922) 2

Radio Station WOW v. Johnson, 326 U. S. 120, 123-6 (1945) 6
Ry. Express Agency v. Virginia, 282 U. S. 440, 443 (1930) 5
Schware v. Bd. of Bar Examiners, 353 U. S. 232, 246 (1957) 5, 24
Shelley v. Kraemer, 334 U. S. 1, 14 (1947) 5
Shuttlesworth v. City of Birmingham, 34 U. S. L. Week 4009, 4011 (U. S. November 15, 1965) .5, 24
Sioux City Brjdge Co. v. Dakota County, 260 U. S. 441 (1943) 14, 39
Smith v. Ill. Bell Tel. Co., 282 U. S. 133, 149, 162, 164, 169 (1930) 6, 39
Southwestern Bell Tel. Co. v. Pub. Serv. Com., 202 U. S. 276, 289, 297-8 (1923) (dissenting opinion) 28
State Tax Com. v. Murray Co., 364 U. S. 289 (1960) 21
Taylor v. Louisiana, 370 U. S. 154 (1962) (per curiam) 5, 24
Thompson v. City of Louisville, 362 U. S. 199 (1960) 5
Torcaso v. Watkins, 367 U. S. 488-9, 496 (1961) .. 5
Walters v. City of St. Louis, 347 U. S. 231, 237 (1954) 6, 39, 43
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27 (1909) 39
Washington v. U. S., 357 U. S. 348 (1957) (per curiam) 5, 24
Williams v. Mississippi, 170 U. S. 213, 225 (1898) 39

Federal District Courts:

County of San Mateo v. So. Pac. Rr. Co., 13 Fed. 722 (1882) (D. Cal.) (Field, J. on Circuit), dismissed per stipulation, 116 U. S. 138 (1885) .. 6, 39
Del. L. & W. Rr. v. Kingsley, 189 F. Supp. 39 (D. N. J. 1960) 44, 45

L. & N. Rr. Co. v. Pub. Service Com. et al., Civ. No. 4310, M. D. Tenn., February 1, 1966 ..... 6, 30, 41, 42, 44

State Courts:

Alabama:

L. & N. Ry. Co. v. State, Civ. No. 3637, 15th Jud. Dist., Montgomery (pending)..... 30

Arizona:

So. Pac. Rr. Co. v. Cochise County, 377 P. 2d 770 (1963) 30, 44

Arkansas:

Kansas City So. Rr. Co. v. Ark. Pub. Serv. Com., 323 S. W. 2d 193 (1959)..... 29

St. Louis-SF Ry. Co. v. Ark. Pub. Serv. Com., 304 S. W. 2d 297 (1957)..... 25, 29

Florida:

Florida East Coast Rr. Co. v. Board, 178 S. 2d 355-357 (1965) 29, 32

Florida East Coast Rr. Co. v. Board, Civ. No. 17709, Circuit Court, Second Judicial Circuit, Lean County, Florida, March 27, 1964..... 32, 33

Illinois:

Bistor v. McDonough, 348 Ill. 624, 632 (1932).. 14

CB&Q v. Dept. of Rev., 17 Ill. 2d 376, 390 (1959) 10, 19, 29

C&NW v. Dept. of Rev., 6 Ill. 2d 278 (1955), cert. denied 351 U. S. 950 (1956), rehearing denied, 352 U. S. 859 (1956) 4, 10, 29

Kochesperger v. Drake, 167 Ill. 122 (1897).... 7

Law v. People ex rel., 87 Ill. 385, 405-06 (1877) 14

People ex rel. Callahan v. GM&O, 8 Ill. 2d 66 (1056) 4

People ex rel. Enrinetta v. GM&O, 29 Ill. 2d 605 (1964) 14, 30
People ex rel. v. CB&Q, 300 Ill. 399, 404 (1921) 14
People ex rel. Hillison v. CB&Q, 22 Ill. 2d 88 (1961) 13, 14, 30
People ex rel. I. C. Rr. Co., 273 Ill. 220, 244-49 (1916) 14
People ex rel. I. C. Rr. Co., 355 Ill. 601, 606 (1934) 14
People ex rel. Kohorst v. GM&O, 22 Ill. 2d 104 (1961) 14, 30
People ex rel. Little v. St. Louis Merchants Bridge, 282 Ill. 408, 412 (1918)..... 4
People ex rel. Murray v. City of St. Louis, 297 Ill. 199, 202 (1921) 4
People ex rel. Wenzel v. C&NW, 28 Ill. 2d 205 (1963) 14, 30
Peoples Gas Co. v. City of Chicago, 309 Ill. 401, 423 (1923) 6

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C & NW v. State Tax Com., 137 N. W. 2d 246 (1965) 30

Kansas:

Kansas City So. Ry. Co. v. Board, 331 P. 2d 899 (1958) 29

Nebraska:

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C&NW v. State Board, 101 N. W. 2d 873-881 (1960) 30
U. Pac. v. State Board, 101 N. W. 2d 892, 899 (1960) 30

New Jersey:

Central Rr. et al. v. Neeld, 139 A. 2d 110 (1958) (N. J.) 44

DEL, L. & W. RR. v. NEELD, 139 A. 2d 9, 10-11 (1958) 44

South Dakota:

C. M. St. P. & Pav. v. Gillis, 118 N. W. 2d 313, 315-6 (1962) 30

C&NW v. Gillis, 118 N. W. 2d 316 (1962) 30

Wyoming:

CB&Q v. State Bd., 400 P. 2d 494 (1965) 29

Constitutions:

United States:

Amend. XIV, § 1 .....7, passim

Illinois:

Art. IX, § 1 (1870) .....6, 7, 9, passim

Art. X, § 8 (1870) 4

Art. VI, § 22 (1870) as amended 4

Statutes:

28 U. S. C. § 1257 (2) 5, 19

28 U. S. C. § 1341 7

49 U. S. C., § 19a 12, 31

Ill. Rev. Stat. 120, §§ 559, 572, 372.2 (1965) 3

c. 120, §§ 619, 620 (1961) 4

c. 14, § 4 (3) (1961) 4

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c. 120, §§ 675, 706, 713, 715, 716 (1965) 4

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c. 110, § 101,36 (1965) 2

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Notes:

Note, "Constitutionality of State Equalization of Property Assessments in Illinois," 17 U. Chi. L. Rev. 93 (1949) 14
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Census of Governments: 1962
Vol. II, Taxable Property Values..... 22
Vol. IV, No. 2, State Payments to Local Governments 7-10, 29-30 35
Vol. VI, No. 4, Historical Statistics on Government Finances and Employment 44-46.. 22

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The World Almanac 222 (1965) 21
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id. 103 22
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I The Role of The States in Strengthening the Property Tax 43-44 (Adv. Com. on Intergovernmental Relations 1963) 35

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., et al.,
Appellees.

On Appeal from the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT.*

The People of the State of Illinois appeal from forty-six judgments of the Supreme Court of Illinois reversing forty-six judgments of the Circuit Court of Madison

* This document is unavoidably long. The cases involve judicial value finding in the property tax field on constitutional levels of national importance. The opinions of both the trial court and the Supreme Court of Illinois occupy 44 pages. A highly significant decision of February 1, 1966, by Federal Judge William E. Miller of the Middle Eastern District of Tennessee occupies 18 pages. Emphasis is added in this Statement unless otherwise explained.

County, Illinois, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial questions are presented. This Statement is also intended to include the material appropriate in a petition for certiorari. 28 U. S. C., §§ 1257 (3), 2103, **Flournoy v. Weiner, 321 U. S. 253, 263 (1944); Prudential Ins. Co. v. Cheek, 259 U. S. 530, 547 (1922).**

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Illinois reported in **33 Ill. 2d 88 (1965) and 210 N. E. 2d 196 (1965)** is printed as Appendix A at A 1-15 *infra*. The opinion of the trial court is not reported but is printed as Appendix B at A 16-44 *infra*.[1] The forty-six judgments of the Supreme Court of Illinois are essentially identical and one of them is printed as Appendix C at A 45 *infra*. The form of trial court judgments is appended to the trial court's opinion. Appendix B at A 37-44 *infra*.

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[1] It is in the form of a statement of reasons filed in the Record on Appeal to the Supreme Court of Illinois. Illinois Supreme Court Rule 36 (1) (3). Ill. Rev. Stat. ch. 110, § 101.36 (1965). The transcript of the Record filed with this Court pursuant to Rule 13 consists of virtually all of the proceedings before both the trial court and the Supreme Court of Illinois. The Record on Appeal to the Supreme Court of Illinois consists of forty-six "short records" and a consolidated trial and appellate Record consisting of four volumes of testimony (I-IV Test.), twelve volumes of exhibits (I-XII Exhibits) and three volumes of the "Illinois Supreme Court Record" containing the papers reflecting the proceedings on appeal. Supreme Court of Illinois Rule 36; I-III Ill. Sup. Ct. Rec. The Record contains comprehensive evidence about state assessment of railroad property for ad valorem tax purposes in the largest railroad state in the Union, 1933-1963. Also filed with the Clerk of this Court are nine copies of the following appeal documents presented to the Supreme Court of Illinois: the railroads' two volume Abstract of Record, the People's Additional Abstract of the Record, the People's two Briefs and their Petition for Rehearing. A deposition of Raymond S. Danis is certified as part of the Record.

JURISDICTION.

These cases, consolidated for hearing by the Circuit Court of Madison County, Illinois, were brought by the People of the State of Illinois upon the relation of the Madison County Tax Collector to determine whether the People of the State of Illinois or twelve railroad taxpayers are entitled to certain ad valorem taxes which had been charged against the railroads' Madison County properties and paid under protest.[2] The cases developed as tax objection proceedings pursuant to the Illinois Revenue Act of 1939, as amended. Ill. Rev. Stat. ch. 120, §§ 482-824 (1963).[3]

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[2] Madison County is on the Mississippi River near St. Louis, Missouri. The Chicago, Burlington & Quincy (CB&Q), New York Central (NYC) and Chicago and Eastern Illinois (C&EI) contest taxes extended for each of the six years, 1957-1962 (18 cases). The Chicago & Northwestern (C&NW) and Gulf, Mobile & Ohio (GM&O) contest taxes extended for each of the five years, 1958-1962 (10 cases). The Illinois Central (IC) and New York, Chicago & St. Louis (Nickel Plate) contest taxes extended for each of the four years, 1959-1962 (8 cases). The Pennsylvania (Pa.), Wabash (W), Terminal Railroad Assoc. of St. Louis (TRRA), Illinois Terminal (IT) and Alton & Southern (AS) contest taxes extended for each of the two years, 1961-1962 (10 cases). See Appendix B at A-32, 33, 34 *infra*.

[3] Public utility property is generally assessed by local assessors in Illinois but most railroad property is state assessed by the Governor's appointee, the Director of Revenue, who is required by statute to discharge the duties of the Department of Revenue which include equalization of locally assessed property at full value and certification of appropriate multipliers to the 102 counties and prior to 1963, assessment of railroad operating property at full value and distribution of the assessments to the counties of the state. See Appendix D at A. 46-48 *infra*. The office of Director of Revenue and the Department of Revenue were created by the legislature in 1943. They assumed the duties, *inter alia*, of the three member Tax Commission which, also appointed by the Governor, had assessed railroad operating property, 1919-1942. The Director also assesses capital stock and private car line companies. Ill. Rev. Stat. ch. 120, §§ 559, 572, 372.2. (1965). For many years state-assessed taxpayers have had dual access to the state judiciary. First by appeal from the Director's assessment order to any appropriate trial court

The judgments below were entered on June 24, 1965, and the People's Petition for Rehearing was denied on September 27, 1965. Notices of appeal were filed in each of the cases on December 23, 1965. The jurisdiction of the Supreme Court to review these decisions is conferred by 28 U. S. C. § 1257 (2). The following decisions sustain

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with direct appeal thereafter to the Supreme Court. Ill. Rev. Stat. ch. 120, §§ 619, 620 (1961). The parties usually are the railroad and the Department of Revenue and the Department is represented by the Attorney General. Ill. Rev. Stat. ch. 14, § 4 (3) (1961). *E. g., C. & NW v. Dept. of Rev.*, 6 Ill. 2d 278 (1955). Second, by a tax objection proceeding in any county in which the railroad owns property against which taxes have been billed. Any taxpayer may pay part of his annual county tax bill under protest to the County Collector who is the elected County Treasurer, a constitutional officer, serving in an ex-officio capacity pursuant to legislative mandate. Ill. Const. art. X, § 8 (1870); Ill. Rev. Stat. ch. 120, §§ 657, 671 (1961). The People of the State upon the relation of the Collector subsequently apply to a trial court of record in the county for a judgment against the taxpayer's property in the county because of the protested taxes. After due notice the taxpayer may file a "defense," "specifying, in writing, the particular cause of the objection," and the statute provides that the Court hear and determine the matter "in a summary manner, without pleadings and shall pronounce judgment as the right of the case may be. . . ." The statute provides the judgment adverse to the taxpayer shall be in the name of the "People of the State of Illinois." Ill. Rev. Stat. ch. 120, §§ 675, 706, 713, 715, 716 (1965). The parties are the People of the State ex rel. the Treasurer ex-officio the Collector and the taxpayer. The Supreme Court of Illinois has held that the "State of Illinois" is both "the nominal and real and substantial party" adverse to the taxpayer. *People ex rel. Murray v. City of St. Louis*, 297 Ill. 199, 202 (1921). The People and the Collector are usually represented by the chief county legal officer, the State's Attorney, also a constitutional officer. Ill. Rev. Stat. ch. 120, §§ 716, 697; ch. 14, § 5 (1961); Ill. Const. art. VI, § 22, as amended (1870). *E. g., People ex rel. Callahan v. GM&O*, 8 Ill. 2d 66 (1956). The State's Attorney has the same common law powers as the Attorney General has in Illinois as well as statutory powers and has the power to represent the People in matters affected with a public interest. See Note, "The Relationship Between the Attorney General and the State's Attorney in Illinois," U. Ill. L. F. 507 (1949). A tax objection case has been described as "a civil suit or proceeding for the collection of a debt. . . ." *People ex rel. Little v. St. Louis Merchant's Bridge Co.*, 282 Ill. 408, 412 (1918); *Keokuk Bridge Co. v. Salim*, 258 U. S. 122, 124-5 (1922).

the jurisdiction of the Supreme Court to review the judgments on direct appeal in these cases:

A. Judicial action is state action.

Shelley v. Kraemer, 334 U. S. 1, 14 (1947).

B. Conflict between a state constitutional provision as applied and the federal constitution is within the scope of 28 U. S. C. § 1257 (2).

King Mfg. Co. v. City Council, 277 U. S. 100 (1927);
Ry. Express Agency v. Virginia, 282 U. S. 440, 443 (1930);
Torcaso v. Watkins, 367 U. S. 488-9, 496 (1961);
Adamson v. California, 332 U. S. 46, 48 (1947);
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 289 (1921);
Fiske v. Kansas, 274 U. S. 380, 385-6 (1927).

C. Fourteenth Amendment protects against arbitrary judicial fact findings.

Minnesota Rate Cases, 230 U. S. 352, 465-66 (1913);
Fiske v. Kansas, 274 U. S. 380, 385-6 (1927);
Schware v. Bd. of Bar Examiners, 353 U. S. 232, 246 (1957);
Washington v. U. S., 357 U. S. 348 (1957) (per curiam);
Thompson v. City of Louisville, 362 U. S. 199 (1960);
Garner v. Louisiana, 368 U. S. 157, 163, 170-1, 173-4 (1961);
Taylor v. Louisiana, 370 U. S. 154 (1962) (per curiam);
Shuttlesworth v. City of Birmingham, 34 U. S. L. Week 4009, 4011 (U. S. November 15, 1965).

D. Fourteenth Amendment protects against discriminatory property taxation.

Cumberland Coal Co. v. Board, 284 U. S. 23-25, 30-1 (1931);

Hillsborough Township v. Cromwell, 326 U. S. 620, 623 (1945);
Walters v. City of St. Louis, 347 U. S. 231, 237 (1954);
L & N Rr. Co. v. Public Service Com. of Tennessee, Civ. No. 4310, M. D. Tenn., Feb. 1, 1966;
County of San Mateo v. So. Pac., 13 Fed. 722 (1882) (D. Cal.) (Field, J., on Circuit) dismissed per stipulation, 116 U. S. 138 (1885).

E. Duty of this Court to analyze facts intermingled with law in order to pass on federal question.

Fiske v. Kansas, 274 U. S. 380, 385-6 (1927);
Napue v. Illinois, 360 U. S. 264, 271-2 (1958);
Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 593 (1914);
Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 149, 162, 164, 169 (1930);
Lindheimer v. Illinois Bell Tel. Co., 292 U. S. 151, 155, 158 (1934).

F. Finality of judgments below.

Carondolet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 372-3 (1914);
Johnson v. Muelberger, 340 U. S. 581, 583 (1951);
Radio Station WOW v. Johnson, 326 U. S. 120, 123-6 (1945);
Gillespie v. U. S. Steel, 379 U. S. 148, 152, 154 (1964);
Brown Shoe Co. v. U. S., 370 U. S. 294, 305-11 (1962);
People's Gas Co. v. City of Chicago, 309 Ill. 40, 42-3 (1923).

CONSTITUTIONAL PROVISIONS INVOLVED.

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property such value to

be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. . . ." Ill. Const. art. IX, § 1 (1870).[4]

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U. S. Const., amend. XIV, § 1.

STATUTORY PROVISIONS.

Statutory enactments 1945-63 which define certain duties of the Director of Revenue, who is the chief administrative tax official in Illinois, are germane. The more significant provisions are printed as Appendix A at A 46-49 *infra*.

The Johnson Act.

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U. S. C. § 1341.

QUESTIONS PRESENTED.

1. Whether the uniformity clause in Article IX, Section 1 of the Illinois Constitution as applied by the Supreme Court of Illinois to the facts of these cases is repugnant to the due process clause of the Fourteenth Amendment because the Supreme Court of Illinois arbitrarily and un-

[4] The "uniformity clause" applies only to property taxes. *E. g., Kochesperger v. Drake*, 167 Ill. 122 (1897). "Generally speaking, Illinois is known as having a constitutional limitation which requires the strictest degree of uniformity in the taxation of property." Newhouse, Constitutional Uniformity and Equality in Taxation 125 (1959). ". . . the long tradition of rigid constitutional interpretation and a difficult constitution-amending process explain the persistence of the all-inclusive nature of the property tax in Illinois. . . ." Netzer, Economics of the Property Tax 154 (1966).

fairly has found the value of state-assessed railroad property during the period 1957-1962 by employing huge dollar reductions which are unsupported by any data or rational evidence in the Record or elsewhere, thereby shifting an excessive share of the property tax burden to non-railroad taxpayers.

2. Whether the uniformity clause in Article IX, Section 1 of the Illinois Constitution as applied by the Supreme Court of Illinois to the facts of these cases is repugnant to the equal protection and due process clauses of the Fourteenth Amendment because in finding the value of state-assessed railroad property for the period 1957-1962 the Supreme Court of Illinois arbitrarily, discriminatively and completely disregarded the huge post-World War II increases in the cost of that property resulting from the inflationary movement of the price level and property additions, having previously mandated complete reliance on inflated prices in finding the value of locally-assessed property, thereby shifting an excessive share of the property tax burden to non-railroad taxpayers.

3. Whether the Supreme Court of Illinois has violated the due process clause of the Fourteenth Amendment to the United States Constitution in ordering for railroad taxpayers substantial property tax reductions predicated upon judicial findings of value for state-assessed railroad property during the period 1957-1962 which arbitrarily and unfairly rest on huge dollar reductions which are unsupported by any data or rational evidence in the Record or elsewhere, thereby shifting an excessive portion of the property tax burden to non-railroad taxpayers.

4. Whether the Supreme Court of Illinois has violated the equal protection and due process clauses of the Fourteenth Amendment in ordering for railroad taxpayers substantial property tax reductions predicated upon findings of value of railroad property during the period 1957-1962

which arbitrarily, discriminatively and completely eliminate the influence of huge post-World War II increases in the cost of the property resulting from inflation of the price level and property additions, having previously mandated complete reliance on current prices in finding the value of locally assessed property, thereby shifting an excessive share of the property tax burden to non-railroad taxpayers.

STATEMENT.

In late 1958 twelve railroads filed written objections to the People's application for judgment and sale against their properties in Madison County, Illinois on account of property taxes paid under protest by the railroads for the year 1957, and they filed similar objections each year thereafter through 1963 for the tax years 1958, 1959, 1960, 1961 and 1962. The trial before the Circuit Court of Madison County in 1964 involved all of these objections, and culminated in judgments ordering sizeable refunds to each railroad. The objections asserted that the railroads' taxes were excessive because the Director of Revenue had not increased the assessments of locally assessed property in Madison County to an amount reflecting the full value of such property and at the same time had assessed their Illinois properties in amounts equal to their full values, then distributing an appropriate portion of those assessments to Madison County for inclusion in the County tax books. The Director's pertinent statutory duties are printed as Appendix D at A. 46-49 *infra*. In Madison County and throughout Illinois railroad state-assessed property has comprised about four percent of assessed values. If locally assessed property in Madicon County had been equalized by the Director at full value, rather than at about 50% of value, the railroads remonstrated, the tax rates (which were derived each year by dividing the entire tax base into the tax levies adopted by the various units of local government including the public schools)

would have been significantly lower than the rates actually applied. In short, the railroads claimed their taxes were about twice as high as they should have been because their property was assessed and taxed at its full value.[5]

Nine of the Appellee railroads alleged in their objections that the Director of Revenue had violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution by administering his statutory duties in such a manner as to create discriminatory levels of assessment between state-equalized locally assessed property on the one hand and state-assessed railroad property on the other hand. To be precise, the railroads asserted that the Director purposely had not determined the value of locally assessed property accurately and his equalization multipliers certified to Madison County did not increase local assessments to value, while the Director did find value of railroad property correctly and formulated the assessments equal to the value. Of these nine Appellees eight also alleged that the Director of Revenue had violated the uniformity clause

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[5] In the early and mid-1950's two railroads had unsuccessfully asserted that their taxes were too high because their assessments were excessive in violation of the statutory standard of value due to the Director's use of reproduction cost as an element of value. *C&NW v. Dept. of Rev.*, 6 Ill. 2d 278 (1955) (Schaefer, J.), cert. denied 351 U. S. 950 (1956), rehearing denied, 352 U. S. 859 (1956), and *CB&Q v. Dept. of Rev.*, 17 Ill. 2d 376 (1959) (Schaefer, J.). Since 1945, local government expenditures and property tax levies, which in Illinois support only local government and provide most of local government finance, had increased much more rapidly than had assessments. The average property tax rate in Illinois had increased from 2.39 per $100.00 equalized assessed valuation in 1948 to 3.79 in 1960. Report of the Commission on Revenue of the State of Illinois 456 (1963) (data from Property Tax Division of the Department of Revenue); in 1962, the average rate jumped to 4.73. Peo. Ex. 19a; I Exhibits. Assessed valuations in Illinois moved from $20,760,692,207 in 1946 to $23,133,067,629 in 1950 to $27,601,900,590 in 1955 to $34,860,116,397 in 1961, *i. e.*, 67.9% from 1946 to 1961 as property taxes increased during the same period from $416,896,010 to $1,400,303,027. Peo. Ex. 20E, I Exhibits.

of the Illinois Constitution, Art. IX, § 1. All nine, moreover, alleged violations of the due process clause and other provisions of the Illinois Constitution. Three other Appellees, CE&I, Pa. and CB&Q, with one exception, never particularized the legal basis of their defense of discriminatory taxation. The exception was the CB&Q which, with regard to tax year 1959, on January 23, 1961, charged the Director with violating the uniformity clause of the Illinois Constitution. Each objection is in the "Short Records" filed in the Supreme Court of Illinois and here, and are summarized at pp. 4-141 of the railroads' Abstract (Vol. I). I Ill. Sup. Ct. Rec. 17. No other pleadings are provided for in this type of proceeding.

At the trial the railroads introduced data compiled by the Director's staff (Property Tax Division of the Department of Revenue) to prove that the value of locally assessed property in Madison County was generally twice as high as the assessments of this property even after application of the multipliers which had been certified by the Director to Madison County (after 1957, a multiplier of 1). The railroads also introduced evidence to prove that the value of their state-assessed property was equal to the Director's assessments. The People introduced evidence including the Director's own data to prove that the Director's railroad assessments were purposely formulated at less than value in response to constitutional mandates of uniformity which were pertinent because of the Director's failure after 1946 to equalize locally assessed property throughout the state at 100% of value.[5a] Crucial data is condensed in graph form, Appendix F at A 52 *infra*, and by numeral display, Appendix E at A 51 *infra*.

The trial court entered judgments ordering sizeable refunds to each railroad for each year. Appendix B at A. 32-4, 37-44 *infra*. The judgments were predicated upon de-

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[5a] *Del., L. & W. Rr. Co. v. Neeld*, 130 A. 2d 6, 10-1, 14 (1957) (N. J.); see n. 6 at p. 14 *infra*.

terminations of value in each year for each railroad and a determination of value in each year for locally assessed property. The trial court upheld the railroads' contention about the level of assessment of locally assessed property in Madison County, relying on sales study data based on inflated price levels, to determine value, and relating the assessments to value found the levels of assessment in Madison County for 1957-1962 ranged from 48.14% to 50% of value. The court's findings of value for each railroad's state-assessed property were based on data placed on "assessment data sheets" by the Director's staff from information supplied by the railroads in annual returns, and obtained from the Bureau of Valuation of the Interstate Commerce Commission which had been compiled pursuant to Section 19a as amended of the Interstate Commerce Act, 49 U. S. C., § 19a. The Director's staff had determined system figures for capitalized income, stock and debt and reproduction cost less depreciation and obsolescence and allocated them into Illinois explicitly reducing the ICC cost figure before averaging the elements of value. Most specifically, the trial court found railroad values by employing a valuation formula as it had been essentially applied during the 1940's and again in 1963 by the Director, averaging the three elements of value traditionally utilized in Illinois: capitalized earnings, stock and debt value and reproduction cost less depreciation and obsolescence. Relating the judicially determined statewide values of each Appellee's property to the Director's respective statewide assessments for each railroad for each year, the trial court derived levels of assessment. In its value determinations for Appellees' properties the trial court did not employ certain huge reductions from the average of the three traditional elements of value used by the administrator in formulating the assessments. These so-called "judgment factor" reductions had grown to huge dimensions during the 1950's as railroad assessments remained level despite

sustained inflation after World War II. See Appendix F at A. 52 *infra.* In 1963, subsequent to newly enacted legislation requiring the Director to equalize railroad assessments with locally assessed property, the Director had likewise discarded these "judgment factor" reductions and found railroad values to equal the averages of the three traditional elements of value. Appendix B at A. 29 *infra.* The trial court's findings of value led to determinations that the levels of assessment for Appellees' state-assessed property ranged from 58-85% of value, 1957-62. See Appendix B at A. 32-34 *infra.* The effect of these findings was to decrease substantially the amount of refunds which 100% levels of assessment would have required. Having determined that the difference in the levels of assessment warranted relief for the railroads, the trial court ordered that the refunds be computed according to the mandate of **People ex rel. Hillison v. CB&Q, 22 Ill. 2d 88, 96-99 (1961)** *i. e.*, determine what the taxes of the railroads would have been if all property in Madison County had been assessed at its full value and subtract those amounts from the taxes actually billed, the remainders constituting the refund amounts. Appendix B at A. 37-45 *infra.*

The trial court's opinion with regard to valuation of railroad property emerged from the conclusion that the economic theory, explained in the Record, underlying the Illinois valuation formula as developed and refined by highly qualified economists 1933-1949 who were in the employ of the State of Illinois, was sound, and that the "judgment factor" reductions from the formulaic averages were arbitrary items used by the administrator to eliminate inflation since World War II for the purpose of complying with constitutional duties of uniformity. The trial court rejected argument that the "judgment factors" were elements of value. To use the "judgment factor" reductions as elements of value for purposes of the

property tax would be arbitrary and discriminatory, particularly in view of prior Supreme Court of Illinois precedents requiring exclusive reliance on the inflated price level in finding the value of locally assessed property. See Appendix B at A. 28-30 *infra*. Following the example of the Supreme Court of Illinois in four prior decisions 1961-64, the trial court verbalized the basis of relief as "constructive fraud."[6]

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[6] On limited Records involving one railroad for one or several tax years the Supreme Court of Illinois had granted relief in four cases arising in other counties. In these cases the Court's articulated rationale was "constructive fraud," a doctrine which had developed in Illinois jurisprudence over many decades to preclude, not to justify, judicial interference with administration of the property tax. People's Second Brief in the court below contains a survey of the pertinent Illinois law, 1859-1959. II Ill. Sup. Ct. Rec. 88. Thus in *People ex rel. Hillison v. CB&Q*, 22 Ill. 2d 88 (1961) (tax year 1958); *People ex rel. Kohorst v. GM&O*, 22 Ill. 2d 104 (1961) (tax year 1957); *People ex rel. Wenzel v. C&NW*, 28 Ill. 2d 205 (1963) (tax years 1956-59) (railroad valuation not at issue); and *People ex rel. Enrietta v. GM&O*, 29 Ill. 2d 605 (1964) (tax year 1959), the Supreme Court of Illinois did not discuss the constitutional nature of the litigation or acknowledge that it was determining values. Rather the court erroneously premised that it was directly reviewing railroad assessments. The effect of the oversight was compounded when in purporting to review railroad assessments, the Court overlooked the presumption of compliance by the Director with constitutional mandates arising from the railroads' contemporaneous proof that locally assessed property had been equalized by him at far less than the statutory standard of full value. The Director has always been under a constitutional duty to debase railroad assessments if locally assessed property assessments were equalized at less than full value—even if to do so he must violate a statute. *People ex rel. v. I. C. Rr. Co.*, 355 Ill. 601, 606 (1934); *Bistor v. McDonough*, 348 Ill. 624, 632 (1932); *People ex rel. v. CB&Q*, 300 Ill. 399, 404 (1921); *People ex rel. v. I. C. Rr. Co.*, 273 Ill. 220, 244-49 (1916); *Law v. People ex rel.*, 87 Ill. 385, 405-06 (1877); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446 (1923). In fact, until 1946 the Director, and the Tax Commission before him had violated the statute which since 1927 had required full value assessments of railroad property by explicitly equalizing railroad assessments. See *e. g.*, Hodes, "The Assessment of Railroads in Illinois, 29 Ill. L. Rev. 744, 759 (1935); Note, "Constitutionality of State Equalization of Property Assessments in Il inois," 17 *U. of Chi. L.* Rev. 93 (1949); Note, "Equalization of Railroad Assessments in Illinois," 35 *Ill. L. Rev.* 766 (1941).

The People did not appeal the trial court's judgments. The method for finding the value of locally assessed property had been not only clearly mandated during 1961-4 by the Supreme Court of Illinois in **Hillison, Kohorst, Wenzel** and **Enrietta** based on records which were ample on the question but also the method was soundly grounded in the evidence and economic theory as the present record discloses. The trial court's findings of value for railroad property were also soundly grounded in data and in economic theory as the record discloses.

The railroads appealed the judgments because of the value findings of their property and asserted in their Notices of Appeal that the trial court's judgments, to the extent that they rested on the value findings of railroad property, violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution as well as the uniformity clause of the Illinois Constitution and several other state constitutional provisions. Vol. I, Rr. Abstract 151, I Ill. Sup. Ct. Rec. 17. The railroads' grievance was that in finding values the trial court had not utilized "judgment factor" reductions from the formulaic averages for 1957-1962. See Appendix E at A. 51 *infra*. Defending the trial court's judgments in the Supreme Court of Illinois, as they had defended the Director of Revenue in the trial court, in an effort to collect the public revenue due, the People responded to two Briefs filed by the railroads. The railroads' principal brief at p. 16 reasserted that the trial court's judgments violated the equal protection and due process clauses of the Fourteenth Amendment and also the due process and uniformity clauses of the Illinois Constitution, with quotation from the uniformity clause of the State Constitution set forth on p. 6. I Ill. Sup. Ct. Rec. 22.

The People's two Briefs argued that the trial court had correctly applied state and federal constitutional require-

ments of uniformity, specifically mentioning both the Fourteenth Amendment and the uniformity clause of the Illinois Constitution. The People argued that utilization of the "judgment factor" reductions by the judiciary would violate the due process and equal protection clauses of the Fourteenth Amendment, and, if based upon the uniformity clause of the Illinois Constitution, would enforce that clause in a manner repugnant to the equal protection and due process clauses of the Fourteenth Amendment. People's Brief at pp. 9, 11, 74, 75, 77, 81, 87, 90; II Ill. Sup. Ct. Rec. 72. The People argued that there was no data in the record or elsewhere to support the "judgment factor" reductions and that use of them by the Judiciary as elements of value would constitute arbitrary constitutional fact finding. Moreover, the People argued that their use as elements of value would be discriminatory because the effect of the "judgment factors" in the judicial valuation process would be to arbitrarily eliminate the influence of inflation. Employment of the "judgment factors" would result in the elimination of the inflating influence in the formulaic averages of increases due to price rises and also net property acquisitions, which increases were coincidentally so great that their elimination would destroy the influence of the cost factor used in the Illinois formula for finding value. See People's Second Brief 59-60, 46-53, II Ill. Sup. Ct. Rec. 88. There would thus exude a fundamental unfairness because the value of state-assessed railroad property would be, in this manner determined for the purpose of enforcing uniformity mandates for the property tax and the value of locally assessed property, the Supreme Court of Illinois had held, must be based on sharply and steeply inflated prices. Moreover, use of the "judgment factor" as an element of value in some cases would produce value substantially less than the average of the capitalized income and stock and debt factors. The railroads filed a Reply Brief which quoted some cases based upon

state and Federal constitutional mandates. Rr. Reply Brief at pp. 44-45, II Ill. Sup. Ct. Rec. 84. With leave of Court the People filed a second brief in response to the Reply Brief which had been filed after oral argument. The People referred to the constitutional provisions pertinent to arbitrary and discriminatory taxation and argued that the trial court would have violated pertinent constitutional provisions if it had adopted the railroads' arguments. Peo. Second Brief at pp. 2, 4, 5, 20-30, 39, 16-B, 17-B, II Ill. Sup. Ct. Rec. 88. In its decision the Supreme Court of Illinois reversed and utilized the "judgment factor" reductions as elements of value and determined the values of Appellees' property by reducing the factually-based averages accordingly. The industry values thus implied for 1957-1962 were lower than the industry valuations in 1946 except that for 1957 the industry valuation was 1.2% higher than the 1946 valuation. The Court ordered refunds based upon 100% levels of assessment for Appellees' property. The opinion did not define or discuss the constitutional questions, and it described the People as criticizing the Directors for failure to assess railroad property at its full value, although the People in fact had been defending the Director's actions as a commendable discharge of constitutional duty. Basing its decision on "constructive fraud," the Court issued an opinion which contained important statements unsupported by the Record.[7]

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[7] For example, proceeding from the premise that it was reviewing assessments and overlooking the indubitability that it was finding values, the Court stated that the Director certified railroad assessments to the county as full value assessments. The certifications are in the Record and they state nothing about value. Compare Appendix A at A-13 *infra*, with pp 12-15 of Vol. II of the Railroads' Abstract and with People's Second Brief at p. 53 and with p. 15 of the People's Petition for Rehearing. I Ill. Sup. Ct. Rec. 18; II Ill. Sup. Ct. Rec. 88, 219. Indeed the Director's annual publication notices were ambiguous and the director had never used the statutory words, "fair cash value," as he did in Dec. 1963 as the Record reveals. The opinion stated that People's expert witness, economist and property tax expert Leo Cohen, did not testify that railroad assessments were less than full value. Yet that opinion

Knowing that the Record contained background information in detail never before presented to the Court, and having invited the Court's attention to the true issues of state and federal constitutional import, the People were surprised by the Court's decision and articulations. Therefore the People filed a lengthy Petition for Rehearing which set forth in detail the position that the Supreme Court's judgments were arbitrary and discriminatory and had applied the uniformity clause of the Illinois Constitution repugnantly to the due process and equal protection clauses of the Federal Constitution and had violated rights guaranteed to the People by the due process and equal protection clauses of the Fourteenth Amendment. Peo. Pet. for Rehearing, at pp. 5, 7, 9, 42, 43, 28-35; I Ill. Sup. Ct. Rec. 219. The Supreme Court denied the Petition without elaboration. III Ill. Sup. Ct. Rec. 220. **New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 67 (1928); Braniff Airways v. Nebraska State Board, 347 U. S. 590, 598-9 (1954); Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 677-8 (1930); Great Northern Rr. Co. v. Sunburst Oil Co., 287 U. S. 358, 366-7 (1932); cf. Alaska v. American Can Co., 358 U. S. 224 (1959).**

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was explicitly stated by Professor Cohen. Compare Appendix A at A-89 *infra*, with R. 1576-82 of Vol. III. Test.; Appendix B at A-29 *infra*, and the People's Additional Abstract at p. 97, II Ill. Sup. Ct. Rec. 76, and People's Petition for Rehearing at p. 13, II Ill. Sup. Ct. Rec. 219. The opinion overlooked that Raymond F. Danis, the Director's staff chief for railroad assessments, 1949-1960, never testified that the purpose of the "judgment factor" was to eliminate the influence of price level increases or to eliminate cost as an element of value. Cf. Appendix A at A-11. The changing nature of his obscure and inconsistent rationalizations of the "judgment factor" in five Records to reach the Supreme Court of Illinois after 1954 is traced in Appendix E to People's Brief in the Court below. II Ill. Sup. Ct. Rec. 72. Moreover, no one in the cases at bar testified about the value of nine of the twelve Appellees except Mr. Broley Travis of California, a retired administrator turned consultant, who was not familiar with them and simply eliminated cost in looking at Rr. Ex. 77 which brought together in three trend lines all of the data for all twelve railroads. People's Pet. for Rehearing 14-15, II Ill. Sup. Ct. Rec. 219.

THE QUESTIONS ARE SUBSTANTIAL.

The judgments below are perforce based on constitutional grounds although the opinion below, while referring to discrimination, does not define or discuss the precise constitutional provision(s) applied. The state action challenged is action which interferes with the administration of the property tax by the administrative official duly appointed by the Governor pursuant to duly enacted legislation based upon Art. IX, § 1 of the Illinois Constitution. See pp. 6-7 *supra*. If in writing of discrimination the Court below was indicating that its decision was based upon the uniformity clause of Art. IX, § 1 of the Illinois Constitution,[8] it is clear that this Court's appeal jurisdiction is involved. "Statute" in 28 U. S. C. § 1257 (2) has long been interpreted to include constitutional provisions and there is no reason why applications of such provisions valid on their face are any less within the scope of § 1257 (2) than applications of legislative enactments valid on their face. See the pertinent cases cited at p. 5 *supra*.

There may be no need for clarification of the basis of the decision below as logical analysis of the questions presented suggests. There are two key strands which run through the four questions presented. First, use of the "judgment factor" reductions without adequate evidentiary support as elements of value for railroad property, which reductions eliminate the influence of inflation and property additions, was arbitrary and fundamentally unfair, in violation of the due process clause of the Fourteenth Amendment. Second, use of the "judgment factor"

[8] A suggestion of the basis of the Court's opinion below was made six years before the decision below. In *CB&Q v. Department of Rev.*, 17 Ill. 2d 376, 390 (1959), the Court stated that the railroad may be "bearing a disproportionate share of its tax burden in violation of the constitutional requirement of uniformity, Article IX, Sec. 1, Const. of 1870. . . ."

reductions as elements of value for railroad property was arbitrarily discriminatory, in violation of the equal protection clause of the Fourteenth Amendment. With regard to the first strand, if the basis of decision is an application of the state uniformity clause, this Court's appeal jurisdiction is involved; if the basis is an application of the due process and equal protection clauses of the Fourteenth Amendment, or either, then this Court's certiorari jurisdiction is involved. If the basis is both state and federal provisions, then both appeal and certiorari jurisdiction are involved. If this Court believes that the strand of arbitrary and unfair usage of the "judgment factor" reductions and the strand of arbitrary discrimination resulting from its usage merit an exercise of certiorari jurisdiction there is, we submit, no need of clarification of the basis of the decision below. The explanation is that the first strand, *i. e.*, arbitrary value finding which is unfair and based on inadequate evidentiary support, does not require clarification because the constitutional provision applied is immaterial. The second strand, *i. e.*, arbitrary discrimination, does not require clarification because whether or not the decision is based on a state constitutional provision the strand requires an interpretation of the equal protection clause of the Fourteenth Amendment; that is, if the decision rests on the application of a state constitutional provision the application must be measured against the limitations of the equal protection clause, which are pertinent anyway if the decision is based only on the equal protection clause. In the event that this Court believes that one or both of the two strands does not merit an exercise of certiorari jurisdiction and the same strand(s) presents a substantial question(s), and if this Court concludes that clarification is required in order to determine whether appeal jurisdiction is pertinent, we submit with deference that the Court note probable jurisdiction and continue the cases pending

clarification or vacate the judgments below and remand the cases for clarification. **Minnesota v. National Tea Co., 309 U. S. 551, 555-7 (1940); Mental Hygiene Dept. v. Kirchner, 380 U. S. 194, 196 (1965); State Tax Com. v. Murray Co., 364 U. S. 289 (1960); Jennings v. Illinois, 342 U. S. 104 (1951); Chicago v. Willett Co., 341 U. S. 913 (1951)** (*per curiam*). See Note, "Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision," 62 Col. L. Rev. 822, 835, n. 90, 847, n. 165 (1962).

1. The Financial Impact on Locally Assessed Taxpayers and State and Local Government Is Pervasively Important.

The financial consequences of the Supreme Court's judgments below are incalculably serious. They are of public as well as private nature. The judgments approximately double the amount of the shift of the property tax burden from the railroads of Illinois to the rest of the property taxpayers which had been ordered by the trial court. As of 1960, Illinois ranked fourth in population, with a population of 10,081,000. Illinois ranks first in number of railroads: 69 in 1960. Chicago ranks as the country's greatest rail center served by twenty trunk lines, handling 34,000 freight cars daily. The World Almanac 222 (1965). Every railroad in the state which has tax objections pending for 1957-1962 will now receive in refunds generally about 50% of their total tax bills instead of generally 25% as required by the trial court's findings.[9] Every property taxpayer in Illinois owning

[9] Because judicially found levels of assessment of state-assessed property are involved the whole State is involved. As of February 19, 1966, the People's agent in Madison County, Mr. George Musso, County Collector, is holding $2,043,501.75 of tax monies protested by the railroads, 1957-1962. $3,070,800 had been protested but settlement of some objections reduced the figure. Madison County has the third largest railroad assessment in Illinois, Cook County ranking first, with about 40% of the total railroad assessment. The pending protested tax monies in Cook County approximate $39,661,030.79 as of January 15, 1966. Letter from

property in a tax district which contains railroad property will have to pay a higher tax bill to make up for the increase in refunds ordered by the Court below.[10] In the future as local governmental expenditures including school costs increase and tax rates and property tax burdens increase, the share borne by the railroads will be relatively less and the share of the rest of the tax-paying public relatively more.[11] The court below in interpreting the pertinent constitutional provisions has placed the administrator under mandate to eliminate the influence of inflation in railroad valuations even though in Illinois since 1963 the Director is under statutory duty to equalize railroad assessments with locally assessed property. To the extent that the property tax burdens are affected by an

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Bernard Korzen, Cook County Collector, to George Musso, Madison County Collector, January 21, 1966. In about 31 states most railroad property is state-assessed and in 1961 about 17% of the state assessments of railroad property in the United States. (5.9 billion) was in Illinois. U. S. Bureau of the Census, Census of Governments: 1962, Vol. II, Taxable Property Values 2.

[10] In 1963 there was railroad property in every one of Illinois' 102 counties constituting from .6% to 16.9% of total county assessments. Illinois Property Tax Statistics 99 (Department of Revenue 1963). The proportion of railroad property within particular districts may vary widely.

[11] See pp. 39-41 *infra*. In 1963, total property taxes extended in Illinois were up $48,609,279 over 1962, or 3.3%, with Downstate Illinois experiencing a 6.1% increase. Illinois Property Tax Statistics 103 (Dept. of Rev. 1963). Property taxes in Illinois increased from $382,269,264 in 1945 to $1,521,423,980 in 1963. *Id.* at 101. Local government spending in the United States has increased from nine billion in 1946 to fifty billion in 1965 and by 1970 the figure is estimated at 100 billion. "The Great Urban Tax Tangle," Fortune 106, March, 1965. In 1963, 88% of local tax revenue was provided by property taxes. Maxwell, Financing State and Local Governments 127 (1965). The rate of expenditure increase is faster than for federal spending, for the increase in local spending was 47% from 1958-1965. During 1958-65 property taxes in the United States increased from $12,385,000,000 to $18,414,000,000. U. S. Bureau of Census, Census of Governments 1962, Vol. VI, No. 4 Historical Statistics on Government Finances and Employment 44-46.

excessive shift of millions of dollars from the tax bills of the great railroads to the tax bills of individual taxpayers the interest of the State and of local government is affected. The property tax voters will be less willing to vote for essential governmental action or for public officials who desire to bring about such action because of the already onerous property tax burden further enlarged by arbitrarily discriminatory valuation findings of the judiciary. Uniformity is essential to the viability of the property tax and in that sense judicial action violative of constitutional mandates will tend to weaken the financial strength and viability of local government in the United States.

According to the American Association of Railroads property taxes in Illinois were excessive by $18,928,688 for 1957 because of unconstitutional state administrative action. The Court below has arbitrarily found values to support the claim. The trial court found values which prove the claim grossly exaggerated. According to the AAR, for 1957, nationwide discriminatory property taxes cost the railroads $141,187,829. Sen. Rep. No. 445, 87th Cong., 1st Sess. 487 (1961). The figure is based on the false premise that in all full value states, of which there are 39, state assessments of railroad property, if made, have been equal to full value. See pp. 29-37 *infra*. **I The Role of the States in Strengthening the Property Tax 43** (Advisory Commission on Intergovernmental Relations 1963). See Pierce, "The Case Against Discriminatory State Assessment of Railroad Property for General Property Tax Purposes," 70 Public Utilities Fortnightly No. 7, 434, 439 (1962). The financial stake in these cases is astronomical and in the next 20 years, with increasing tax burdens, not including more inflation, may approach one billion dollars. See pp. 39-41 *infra*.

2. The Arbitrary Judicial Value Findings Below Conflict With Due Process Standards of Judicial Action as Defined by This Court.

Enforcement of uniformity mandates contained in state and federal constitutions in state ad valorem tax cases, gaining momentum in the last six years, particularly in railroad cases,[12] perforce imposes on the judiciary the duty of making determinations of value. The state action here challenged is judicial action and it relies on huge arbitrary "judgment factor" reductions in finding value of property owned by multi-state corporations in an industry which because of federal regulation since 1887 permits value analysis with an amplitude of data and statistics.[13] The state action here challenged violates due process standards developed and applied in **Minnesota Rate Cases, 230 U. S. 352, 465-66 (1913); Schware v. Bd. of Bar Examiners, 353 U. S. 232, 246 (1957); Washington v. U. S., 357 U. S. 348 (1957) (per curiam); Taylor v. Louisiana, 370 U. S. 154 (1962) (per curiam); Garner v. Louisiana, 368 U. S. 157, 163, 170-4 (1961); Shuttlesworth v. City of Birmingham, 34 U. S. L. Week 4009, 4011 (U. S. November 15, 1965).**

The use of the "judgment factor" deflationary reductions as elements of value by the Court below poses questions which technical knowledge proves is of great substantiality. The coloration of the questions is affected by considering that not only were these "judgment fac-

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[12] See note 18 at pp. 29-30 *infra*.

[13] The original cost and reproduction cost data of the Interstate Commerce Commission's staff are in the Record. ICC has prescribed uniform accounting procedures which are in the Record. On April 17, 1963, the ICC amended its Uniform System of Accounts to provide that there be agreement between carrier books and ICC original cost records. 28 F. R. 4302 (1963). Detailed statistics on operations are regularly published by the ICC's Bureau of Transport Economics and Statistics under the name of "Transport Statistics."

tors'' unsupported by data and rational evidence but also the Supreme Court of Illinois utilized them to interfere with the integrity of a sound valuation formula which had been developed in Illinois by trained economists over a long period of time.[14] The substantiality of the questions posed by the arbitrary usage is increased by considering that in the context of the property tax, the Supreme Court below used the ''judgment factors'' to find value of railroad property to enforce constitutional mandates of uniformity when the effect of using them is to eliminate completely the influence of inflation and vast capital improvements since World War II at the same time that the Court below mandated value for other property based exclusively on inflated prices.[15] The substantiality is enhanced also

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[14] Mr. Simeon Leland, author, educator and now Dean of the School of Liberal Arts at Northwestern University; Mr. George W. Mitchell, author, now Member of the Board of Governors, Federal Reserve System, and of the National Committee on Government Finance, appointed by the Brookings Institution, and Lynn A. Stiles, author, now Senior Economist, Federal Reserve Bank of Chicago. Recent decisions reveal that the formula or a comparable facsimile has been and is in use throughout the United States as tax administrators have striven to articulate the valuation process. See Adams, *"Valuation of Railroad Property for Taxation,"* 23 J. Pol. Econ. 12 (1915); See cases cited in n. 18 at pp. 29-30 *infra. E. g., St. Louis-SF Ry. Co. v. Arkansas Public Service Commission,* 304 S. W. 2d 297 (1957) (Ark.); *CB&Q v. State Board,* 101 N. W. 2d 856 (1960) (Neb.). The Nebraska formula appears to be based on judicial value finding. *Chicago, R. I. Rr. v. State,* 197 N. W. 114, 119 (1923) (Neb.) In 1938 the Section of Research of the Federal Coordinator of Transportation under the Emergency Rai road Transportation Act of 1933 objectively reported that each of the alternative elements of value is subject to serious criticisms and that most state administrators use a composite of the elements of value for valuing railroad property. Vol. II, Part II, Public Aids to Transportation 200. See n. 27 at p. 37 *infra.* Why the Illinois formula is sound is explained in the Record by People's witness, Leo Cohen, an economist, educator, and property tax expert. See Appendix B at A-29-30 *infra.*

[15] Analysis of the cost data reveals that the equipment accounts of the railroads have substantially increased since World War II as the fleets were dieselized and facilities improved. Using ICC figures the American Association of Railroads in 1962 reported

by considering that the inflation suppressed by the "judgment factors" is so great that coincidentally by figuring backwards from the assessment one can mathematically demonstrate that the influence of cost in valuation was eliminated by the Supreme Court of Illinois.[16] That is, values found are not significantly higher and in some cases are less than the average of capitalized income and securities values. See Appendix F *infra*. Finally, accounting and other specialized knowledge indicate that the usage of the arbitrary "judgment factors," coincidentally tying the valuations to capitalized income and securities data, requires plenary consideration by the Court of the questions presented.[17]

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that the book value of investment in road and equipment increased from $27,277,974,000 in 1946 to $35,541,973,000 in 1961. *Railroad Transportation, A Statistical Record* 1921-1961, p. 3 (1962). See People's Ex. 72, IV Exhibits. Capital expenditures for new equipment, improvements to equipment and operating property exceeded $100,000,000 each for the CB&Q, the C&NW and the I. C., 1960-64. "The Proposed Rock Island Merger" an undated pamphlet recently distributed among securities specialists by the Board Chairman of the C&NW. The C&NW in Illinois after 1956 completely modernized its suburban equipment and facilities at a cost estimated by a company official of over $40,000,000 and has acquired by consolidation and merger other railroad properties during 1957-1962. See People's Brief, Appendix F, II Ill. Sup. Ct. Rec. 88.

[16] One of the objectives of the unit valuation of railroads was to subject to taxation intangible values deriving from the working agglomeration of physical assets peculiar to railroad operations. These intangibles were intended to increase the value of the railroad over the value of the physical assets. Isaacs, "The Unit Rule," 35 Yale L. J. 838, 843 (1926).

[17] The income figures capitalized are "net railway operating income," an ICC accounting concept, which clearly needs accounting adjustments which, if made, would increase the base figure to be capitalized and the Court below did not require or apparently consider these adjustments. See Appraisal of Railroad and Other Public Utility Property for Ad Valorem Tax Purposes 23-30 (1953) (A Report of the Committee on Unit Valuation of the National Association of Tax Administrators (NATA); People's Brief, at Appendix M, II Ill. Sup. Ct. Rec. 88. Moreover the amount to be capitalized, aside from the accounting adjustments just mentioned, are distorted on the low side due to the peculiari-

In **Minnesota Rate Cases** at 465-66 this Court wrote:

"The wide range of the estimates . . . shows the difficulty and the lack of certainty in passing judg-

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ties of railroad accounting. A large part of railroad expenditure for property is accounted for on a replacement rather than on a depreciation basis, *i. e.*, significant items of property purchased are charged to expenses rather than to capital accounts, contrary to accounting practices followed in other industries, directly deflating income during inflation periods and periods of increased maintenance expenditure. If these expenditures had been capitalized and depreciated instead of being charged to expenses, income would have been much higher. ICC Study 424 in 1949 proposed that the railroads change to depreciation accounting and the railroads resisted. The practice has been condemned by a Committee of the American Institute of Accountants. It is estimated that replacement accounting as of 1946 had caused an understatement of original cost of the industry's property by $868,000,000, and for 1917-1947, net railroad operating income was understated $14,000,000 a year or if capitalized at 6%, $233,000,000 a year. House Report No. 1167, Union Calendar No. 452, 85th Cong., 1st Sess., 6-13 (1957) ("Railroad Accounting Procedures," Twelfth Report by the Committee on Government Operations). During the period 1957-1962 there are other specialized factors which served to deflate net railroad operating income. In 1951, the ICC permitted the railroads to charge off rapid amortization of facilities constructed during the "emergency" of the Korean War over five years instead of over estimated lives, but the ICC did not permit the railroads to set up reserves for federal income taxes thus saved from the acceleration. 284 ICC 9. During 1957-1962 many amortization periods expired and federal income taxes increased disproportionately as the CB&Q's Annual Reports in the Record explain. See House Report No. 1167 *supra* at 13-25. Also, during 1957-62, even though per diem rental charges increased, management decided for reasons of economy or necessity to rent more equipment rather than own it, thus vastly increasing car rental expense. Hearings, Freight Car Shortage, Subcommittee of the Committee on Commerce, U. S. Senate, 87th Cong., 1st Sess. 88 (1961). For example, the debit balance of Net Rents (a charge against income) for the C&NW grew from 7.9 million in 1956 to 14.1 million in 1963. See Appendix F, Sheet 1-D, People's Second Brief, II Ill. Sup. Ct. Rec. 88. One of the basic defects of the stock and debt element of value is that many railroads are subject to interlocking control with securities or controlling securities closely held, impeding accurate reflection of true value. For example, during all or most of 1957-1962 the CB&Q, the TRRA and the A. S. were controlled by other railroads or industry, with a very small percentage of stock in the hands of the public. The C&NW during all or part of the period 1957-1962 was the largest single stockholder of the GM&O.

ment. We are of the opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation . . . It may be said that this would have been a very difficult matter but the company having assailed the constitutionality of the State Acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had in its power to present accurate data which would permit the Court to draw the right conclusion."

Mr. Justice Brandeis has written "Judicial judgment ought not to be invoked where facts cannot be adequately explored and resolved," and in criticizing **Smyth v. Ames**, in a rate making case, the Justice wrote, "For the rule not only fails to furnish any applicable standard of judgment, but directs consideration of so many elements, **that almost any result may be justified." S. W. Bell Tel. Co. v. Pub. Serv. Com., 202 U. S. 276, 289, 297-8 (1923)** (dissenting opinion) (emphasis added). These principles are violated by arbitrary judicial use of the "judgment factor."

The fact that the railroad assessments in Illinois have not significantly changed from 1946 to 1962 indicates that state judicial action which finds them to be equal to value —particularly in the context of a rationally designed articulated formula—renders apposite the observation of Mr. Justice Hughes, quoting Mr. Justice Brewer, in **Minnesota Rate Cases** *supra*, at p. 460: " 'Such a result indicates that there is something wrong with the process by which the conclusion is reached . . .' "

3. Arbitrary Use by State Judiciaries of Administrative Deflationary "Judgment Factors" in Constitutional Value Finding Impends Throughout the United States as the Railroads Seek to Obtain Judicial Relief From Property Tax Burdens and at the Same Time a Judicially Created Property Tax Preference for Themselves.

Arbitrary interference with data truly reflecting value by use of "judgment factor" reductions in state assessments of railroad property where the state administrators do not have statutory authority to equalize them—as is the case in most full value states—is not peculiar to Illinois. Its existence in other states of the Union on the state administrative level is being brought to light as the railroads move the judiciary to reduce their property taxes either by review of their assessments, which is based on statutory grounds, or by enforcement of constitutional mandates of uniformity.[18] The Record now before the

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[18] Direct judicial review of administrative assessments have to date failed to obtain judicial elimination of inflation, *i. e.*, reproduction cost or original cost, as an element of value. The issue is does assessment exceed value and the "judgment factors" are not at issue because they are reductions. The opinions in many of these cases are revealing. *C&NW v. Dept. of Revenue*, 6 Ill. 2d 278 (1955) (Schaefer, J.) ("judgment factor" unexplained) *cert. denied* 351 U. S. 950 (1956), *rehearing denied*, 352 U. S. 859 (1956); St. *Louis-S. F. Rr. Co. v. Ark. Public Service Com.*, 304 S. W. 2d 297 (1957) (Ark.); *CB&Q v. Dept. of Rev.*, 17 Ill. 2d 376 (1959) (Schaefer, J.) ("judgment factor" unexplained); *Florida East Coast Rr. Co. v. Assessment Bd., et al.*, 178 S. 2d 355-357 (1965) (Fla.) ("judgment factor" unexplained); *CB&Q v. State Bd.*, 400 P. 2d 494 (1965) (Wyo.) (semble). The railroads have achieved more success in constitutional cases involving state uniformity clause provisions and the equal protection clause of the Fourteenth Amendment in which cases the issue is what is the relation of value to assessment and the "judgment factor" is at issue. *Kansas City So. Ry. Co. v. Board*, 331 P. 2d 899 (1958) (Kan.) (on pleadings); *Kansas City So. Rr. Co. v. Ark. Pub. Service Com.*, 323 S. W. 2d 193 (1959) (on pleadings); *CB&Q v. State Board*, 101 N. W. 2d 856, 862-4, 871 (1960) (Neb.) (arbitrary and unexplained reduction factor); *C&NW v. State Board*, 101 N. W. 2d 873-881

Court, coming up from the premier railroad state, and other sources of information, strongly indicate that state tax administrators have since the onset of inflation in the late 1940's employed arbitrary "judgment factor" reductions or similar arbitrary techniques in central assessments of railroad property in order to suppress inflation in railroad assessments. This arbitrary interference with the valuation process as applied to railroad property on the administrative level developed for the purpose of holding railroad assessments level or reducing them. The action was required because the tax administrators, sensitive to uniformity duty, were aware that after World War II the level of assessment of locally assessed property was dropping as inflation raised values of locally assessed property faster than local assessments were increased by local and state administrative officials, thus causing a retreat of the level of assessment. The need for administrative suppression of inflation in railroad assessments emerged from an unprecedented combination of circumstances: *i. e.*, (a) the onset of sustained inflation in the mid 1940's; (b) the use of reproduction cost (or variant thereof) in ad-

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(1960) (Neb.) (arbitrary and unexplained reduction factor); *U. Pac. v. State Board*, 101 N. W. 2d 892, 899 (1960) (Neb.) (arbitrary and unexplained reduction factor); *People ex rel. Hillison v. CB&Q*, 22 Ill. 2d 88 (1961) ("judgment factor"); *People ex rel. Kohorst v. GM&O*, 22 Ill. 2d 104 (1961) ("judgment factor"); *C. M. St. P. & Pac. v. Gillis*, 118 N. W. 2d 313, 315-6 (1962) (S. D.) (reducing percentage of cost factor weighted); *C&NW v. Gillis*, 118 N. W. 2d 316 (1962) (*per curiam*) (S. D.); *So. Pac. v. Cochise County*, 377 P. 2d 770 (1963) (Ariz.) (on pleadings); *People ex rel. Wenzel v. S&NW*, 28 Ill. 2d 205 (1963) ("judgment factor"); *People ex rel. Enrietta v. GM&O*, 29 Ill. 2d 605 (1964) ("judgment factor"); *C&NW v. State Tax Com.*, 137 N. W. 2d 246 (1965) (Iowa) ("judgment factor" unexplained) (another case now pending in Iowa trial court); *Florida East Coast Rr. Co. v. Green*, 178 So. 2d 355, 358 (1965) (Fla.) ("judgment factor"); *L. & N. Ry. Co. v. Public Service Com. of Tennessee*, Civ. No. 4310, M. D. Tenn., Feb. 1, 1966 (on pleadings; "judgment factor" acknowledged but unexplained) (See Appendix G at A-57-8 *infra*); *L. & N. Ry. Co. v. State*, Civ. No. 36367, 15th Judicial District, Montgomery County, Alabama (pending).

ministrative valuation which element of value reflects inflation;[19] (c) historic and traditional "underassessment," (*i. e.*, assessment less than the alleged statutory

[19] Hard to ascertain facts about the use of reproduction cost and other forms of cost by state tax administrators in the United States in the valuation of railroads for the property tax are as follows: **1900-01**: Michigan State Tax Com. appraises railroad property and determines reproduction cost; **1903-04**: Wisconsin Tax Com. appraises railroad property and derives reproduction cost. Boyle, "Methods of Assessment as Applied to Different Classes of Subjects," 1907 Proceedings of National Conference of State and Local Taxation 128. **1911**: "A fundamental, though not necessarily a controlling element in value is cost of reproduction. This is true of property in general. . . ." Report of the Railroad Securities Commission appointed by the President (among others, Walter L. Fisher of Illinois and Frederick N. Judson of St. Louis) H. Doc. 256 (1911); **1913**: One of the controlling reasons for enactment of the Valuation Act of 1913 (49 U. S. C., § 19A.) Section 19A of the Interstate Commerce Act was passed March 1, 1913, and amended February 29, 1920, June 7, 1922, June 16, 1933, August 9, 1935) was "in connection with railway taxation." The Act required the ICC to determine an inventory of railroad property and value it, ascertaining original cost and cost of reproduction new less depreciation. Moore, "The Federal Valuation of Railroads in the United States", 54 *American Railway Engineering Association* 8 (1953); **1922**: Railroad counsel W. G. Brantley represented to the ICC ". . . the value of the railroad of the carrier is divided into a value of its tangible properties, and the value of its intangible properties meaning its franchises and its business; that the value of its tangible propetries at any given time is measured by reasonable cost to reproduce them at that time . . . that the value of its franchises and business is measured by a consideration of the earnings of the property, past, present and future, and of the right of the carrier to do business . . . as to this value the carrier's position is that its locomotives and cars, its rails and ties, its lands and structures, its embankments and excavations and all of its physical properties have the value of similar properties, similarly located elsewhere, and that such value is wholly independent of the earnings of the railroad, whether such earnings be great or small, or none at all." Memorandum to the ICC on the value of the Atlanta, Birmingham and Atlantic Ry. Co., May 13, 1922. See Tunnell, "Valuation for Taxation and Rate Making," 35 J. Pol. Econ. 1, 22-3 (1927); **1934**: ICC's Bureau of Valuation completed its valuation studies and issued a pamphlet, "A Summary of Valuations of the Steam Railways of the United States as of the years 1914-21 and 1927-28"; reproduction cost new of the industry on valuation dates was less than original cost. See Moore, op cit. supra, at pp. 23-24. **1938**: "Generally assessors and the majority of railroad tax attorneys are disposed to give consid-

standard); and (d) vastly increasing responsibilities of local government since World War II, increasing the tax burden as partially reflected in increas-

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eration to at least three factors in determining the net value [of railroads] . . . the cost of reproduction less depreciation. . . ." Mitchell, "Use vs. Ownership as a Basis for Taxation," 1938 Proceedings of the 31st National Conference of the National Tax Association (People's Second Brief, Appendix K, p. 59-B, II Ill. Sup. Ct. Rec. 88); **1944**: "The cost data compiled by the Interstate Commerce Commission are widely used both in making appraisals of railroads and in allocating units appraisals of interstate roads among the states and in which they operate." *House Doc. 160, 79th Cong., 1st Sess., p.* 112, *Ch. III of Staff Report to Board of Investigation and Research on Carrier Taxation;* **1950**: 22 states "give consideration" to "depreciated replacement cost;" 7 states, to "book cost;" 19 states obtain ICC reproduction cost data. Preliminary Report, Committee on Unit Valuation (National Association of Tax Administrators 13, 18-19 (1950) (unpublished) (9 copies on file with Clerk); an unpublished Report is dated as 1950 but was described in 1958 by John A. Gronouski, an economist (see p. 37 *infra*) as having been issued in 1948 and revealed that of 23 states reporting, "only seven failed to include depreciated reproduction cost" and that most of these used "depreciated book cost. Gronouski, "The Taxation of Utilities," *Michigan Tax Study* (Staff Papers) 297 306 (1958. **1953**: One of the principal uses of valuation date of the ICC is "supplying current reproduction valuations to states for taxing purposes." Moore, op cit. *supra* at 45; **1958**: "In railroad valuation chief reliance is placed on three such items of evidence: capitalized net earnings, stock and debt value and depreciated (original or reproduction) cost. Gronouski op cit. *supra* at 306. **1961**: "The other primary evidences of value are . . . . original and reproduction cost less depreciation . . . Many States, in making a unit appraisal of system value, will cross-breed some or all of these evidences of value." Rep. No. 445, U. S. Sen. 87th Cong., 1st Sess. 455-56; **1965**: ". . . according to an uncontradicted exhibit introduced in evidence by the defendants, the taxing authorities of 31 of our sister states give some consideration to the cost of reproduction, 'book value' or 'initial cost,' . . ." *Florida East Coast Rr. Co. v. Green,* 178 So. 2d 355, 358 (1965) (Fla.), affirming *Florida East Coast Rr. Co. v. Green,* Civ. No. 17709, Circuit Court of the Second Judicial Circuit, Leon County, Florida (March 27, 1964) ("some consideration is given to cost of 'reproduction', 'book value' or 'initial cost' by the railroad assessing authorities of the following states: Alabama, Arkansas, California, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode

ing tax rates. The efforts of the state tax administrators following World War II to eliminate underassessment and discrimination is described in Gronouski; "State Supervision of Property Tax Administration," National Tax Journal 158 (June, 1957); and in the pamphlet, "Equalization Programs and Other State Supervisory Activities in The Property Tax Field," No. RR-42 of Federation of Tax Administrators, 1313 East 60th Street, Chicago 37, Illinois (January 1957), nine copies of which are on file with the Clerk of this Court. The emphasis of the pamphlet is directed toward raising the level of assessment of locally assessed property and measurement of inequity and there is almost total silence about state assessments.

State administrative action making use of arbitrary "judgment factors" or similar techniques to suppress inflation in formulating railroad assessments has never been publicly acknowledged. But see the revelation of February 1, 1966 in Nashville, Tennessee. Appendix G at A-57-8 *infra*.[20] Even though their purpose has been proper, *i. e.*,

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Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin," n. 10, p. 9, of opinion by Judge Hugh M. Taylor. Also at p. 9 there appears the following statement: "Mr. Edward F. Koncel [Illinois railroad assessor, 1961—] expert for the defendants, gave strong support to the propriety of considering cost of reproduction as a factor in valuing railroad property for taxation."

[20] Under date of June 5, 1963, Mr. James Dixey, a staff aid to the Tax Commissioner of Ohio, acting in his capacity as Chairman of the Committee on Ad Valorem Taxation of Railroads and Public Utilities of the National Association of Tax Administrators (NATA), 1313 East 60th St., Chicago, Illinois, sent to Hon. Clarence Lock, President of NATA and Commissioner of Revenue in Michigan a tabulation summarizing responses from state tax administrators in 44 states to a questionnaire. The questionnaire is entitled "Relative to Discrimination in the Assessment of Public Utility Property as Against Other Types of Property." Question 20 was, "Where the statute requires that public utilities be assessed on a full value basis would you say there is some tendency, admin-

implementing constitutional mandates of uniformity between state assessed railroad property and locally assessed property, the lips of the state administrators have been sealed by the pervasive statutory illegality which has always characterized the administration of the property

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istratively, to debase the full value assessment level prevailing locally?" Out of 35 responses to the question, 19 answered "Yes." Question 21 was "If the answer is yes, could you specify a figure (5%, 10%, 20%, etc.)?" There were no responses. Question 23 was "Is there a program in your state to bring the assessment levels of centrally assessed and locally assessed property closer together?" 26 (including Illinois) of 38 states responding to the question answered "yes." Question 25 was "How is this program carried out? (gradual reduction of central assessment ratio; increase in ratio on locally assessed property; or both; holding utility level constant while local ratio raises, etc.). *19 state administrators acknowledged* "Administrative tendencies to debase full value assessments of public utility property to allow for lower assessment level prevailing locally;" 16 state administrators denied it and 9 did not respond to the question. See pp. 15, 24 of the Questionnaire. Nine copies of the papers and covering letter are on file with the Clerk.

(b) In January, 1957, the Federation of Tax Administrators compiled a document (No. RR-42) "Equalization Programs and Other State Supervisory Activities in the Property Tax Field." Table III following p. 15 revealed that assessment ratio data is used to equalize "state assessed, local taxed, property with local assessment" in California, Illinois, Iowa, Missouri, New Hampshire, Washington, and Wisconsin (The text on p. 15 renders the meaning clear: debase rail assessments having discovered from the data the level of assessment of locally assessed property.) Nine copies of the document are on file with the Clerk.

(c) In June, 1957, the Illinois Legislative Council in Bulletin 3-018, "Equalization of Property Tax Assessments," stated on p. 3: ". . . full value of railroad operating property . . . is debased before certification to accord with prevailing assessment levels in the particular county to which the certification is made" (Peo. Ex. 1A, I Exhibits).

(d) In 1955, Mr. Allen Weston, Director of the Railroad and Utilities Division of the Michigan State Board of Assessors stated, "Thus, over the years we have found ways of adjusting physical valuation to reach a level of assessment which is in line with property generally in the state." 1955 Proceedings of the National Tax Association 127-29 (People's Second Brief 45-B, II Ill. Sup. Ct. Rec. 88). See also Peale, *"A Comparative Study of Property Tax Administration in Illinois and Michigan"* 99-100 (1950) (U. of Mich. publication).

tax, *i. e.*, underassessment at levels less than the standard required by statute.[21] An unconscionable web of circumstances has prevented the state administrators from candidly describing their uniformity efforts. They will not admit publicly that local officials are or may be violating statutory provisions in making assessments. They will not publicly admit that they, themselves, are not, or may not be, equalizing local assessments at full value,[21a] nor will they admit that they have been arbitrarily eliminating inflation from railroad assessments for to do so would admit statutory illegalities vis a vis railroad assessments and by implication admit that other violations by local officials and perhaps themselves are being committed vis a vis locally assessed property. In short, they will not openly admit statutory violation. See Appendix B at A-23 and Appendix G at A-57-58 *infra*. The necessity for silence is all the greater because since World War II assessments are increasingly being used to measure state aid to local government units; the higher the level of assessment the less the state aid;[22] the political

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[21] The June, 1963, Report (Vol. I) of the Advisory Commission on Inter-Governmental Relations, entitled, "The Role of the States in Strengthening the Property Tax", at pp. 43-44, stated: "The law of nearly two-thirds of the states appear to contemplate assessment at full value." "The assessment practice in most of the states bears little resemblance to the legal requirements. The actual level of assessment is below the full-value or fractional value prescribed by constitution or statute . . . Deep underassessment on virtually a nationwide basis was disclosed [proved] by the Census Bureau's assessment-sales ratio study for the 1957 Census of Governments . . . Underassessment . . . have long traditions, but since World War II the pernicious effects of these alleged assessment practices have intensified with the deepening of underassessment . . . and the growing dependence on assessed valuations for other than tax base purposes."

[21a] "It has been a common experience to have tax administrators indignantly reject that their valuation was anything less than legally required." *Jensen, Property Taxation in the United States* 283 (1931) (U. of Chi. Press).

[22] "Equalization Programs and Other State Supervisory Activities in the Property Tax Field" 15 (Federation of Tax Administrators RR. 42 (1957) (on file with Clerk); U. S. Bureau of the Census, Census of Governments: 1962, Vol. IV, No. 2, "State Payments to Local Governments" 7-10, 29-30.

consequences of candor by state administrative officials are stifling. Thus when the railroads assert in trade literature,[23] before the National Tax Association[23a] before the American Bar Association Section on Public Utility Law,[24] in Congress,[25] and in Court[26] that state administrative officials are assessing their property at full value,[26a] there is no denial—not even that the assertions are exaggerated.[27]

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[23] "Tax Outrage," *Railway Age* 21-22 (December 1963) (claiming that of $193,296,558 ad valorem taxes paid by railroads in 24 states for 1961, $112,979,417 or 58.45% was excessive because of discriminatory levels of assessment.

[23a] Ogden, "Railroads Deserve Tax Equality," 1960 *Proceedings of the National Tax Association* 378, 387 (Mr. Ogden is counsel for the GM&O). Mr. Ogden's data is the same data supplied to a Senate Committee in 1961 by the American Association of Railroads. See n. 25 *infra*.

[24] Pierce, "The Case Against Discriminatory State Assessment of Railroad Property for General Property Tax Purposes," 70 Public Utilities Fortnightly No. 7, 434, 439 (1962) (Address delivered in August, 1962, by counsel for the Southern Pacific). Mr. Pierce's data was identical with data supplied to a Congressional Committee by the American Association of Railroads in 1961. See n. 25 *infra*.

[25] Report No. 445, U. S. Sen., 87th Cong., 1st Sess., 486-7 (1961), the American Association of Railroads presented a data display to demonstrate that of $260,061,831 of ad valorem taxes paid in 31 states for 1957, $141,187,829, or 54%, was excessive because of discriminatory levels of assessment. At p. 487, the Committee stated, "The resources available to this committee were not such as to be able to conduct an independent survey to affirm or disprove the specific data presented to us."

[26] *E. g.*, the cases at bar.

[26a] As of 1956, the statutes of at least 39 states required 100% of value assessments: Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Virginia, West Virginia and Wisconsin (Also the District of Columbia). Commerce Clearing House State Tax Reporter. For the states which tax railroads by the ad-valorem method and centrally assess their property using cost as an element of value see n. 19 at pp. 32-33 *supra*.

[27] "No state probably ever achieved a complete 100% valuation. There are good reasons for suspicion when anything like a full

The state administrators and their immediate principals, the elected state officials, and therefore the People, are—in the face of contemporary railroad protestations about their property taxes—pinioned by the historic conflict between law and practice which characterizes the administration of the property tax.[27a] In our system only this Court can unpinion the People who now, together with the railroad industry, rely on the Fourteenth Amend-

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value assessment is claimed." *Jensen, Property Taxation in the United States* 83 (1931) (U. of Chi. Press). The silence is all the more explainable if in addition to statutory violations there is in existence constitutionally vulnerable "de facto" classification not involving railroads, which may help to support political empires. See Newhouse, op. cit. *supra* at n. 4, p. 7, at 29-30; n. 27a *infra* at p. 37; R. 300, 295-99, Vol. I, Testimony.

We invite this Court to compare the statements of the opinion of the Court below at A-14-15 with the statement in 1958 of John A. Gronouski, Jr., economist, educator, former research associate in Chicago with the Federation of Tax Administrators, 1952-56, Wisconsin Tax Commissioner (1960-1963), Postmaster General (1963-65) and presently United States Ambassador to Poland, former member of the Executive Board of the American Economic Association and member of the Editorial and Advisory Board of the National Tax Journal: **"IN DERIVING A SINGLE VALUATION FIGURE ON THE BASIS OF THE EVIDENCE EMPLOYED, THE STATES ARE DIVIDED BETWEEN THE USE OF A FORMULAIC AND A JUDGMENT APPROACH. .ILLINOIS, FOR EXAMPLE, TAKES A SIMPLE AVERAGE OF REPRODUCTION COST DEPRECIATED, CAPITALIZED EARNINGS, AND STOCK AND DEBT VALUE."** Gronouski, "The Taxation of Utilities, Michigan Tax Study (Staff Papers) 306 (1958). Mr. Grounouski wrote a Ph. D. thesis, "Valuation of Railroads for Ad Valorem Tax Purposes," Doctoral Dissertation Series Publication No. 14, 701, Universal Microfilms, Ann Arbor, Michigan (1955). See Who's Who in America (Marquis Co., 1964-65, p. 2264).

[27a] Property taxation is "the Dark Continent of Public Finance." Welch, "Some Observations on Assessment Ratio Measurement," 17 Nat. Tax J. 13 (1964) (the author in 1964 was Asst. Executive Secretary of Property Taxes, California State Board of Equalization). See *Lutz, The State Tax Commission* (1918) (Vol. XVII, Harvard Economic Studies); for the period 1850-1890, see *Benson et al., The American Property Tax: Its History, Administration, and Economic Impact* 53 (Claremont College Press, Claremont, California 1965).

ment. The questions presented deserve plenary consideration.[27b] Cf. **Brown v. Board of Education, 347 U. S. 483 (1954); Baker v. Carr, 369 U. S. 186 (1962).**

In the light of these considerations, it is of the utmost public importance to governance and the People that the Court bestow plenary consideration on the questions presented. Due process standards of judicial performance and apposite decisions of this Court requiring that findings of fact be based on rational evidence must be followed in state court proceedings applying constitutional mandates of uniformity for the benefit of railroad taxpayers. The problems are new and the application of due process concepts to them is needed. Arbitrary utilization by the state judiciaries of the arbitrary "judgment factors" developed in the administrative process which elimimate the influence of inflation in judicial value finding will create a preference for the railroads just as violative of uniformity mandates as the discrimination for which the trial court in Madison County in 1964 and a federal judge in Nashville this month gave relief. See Appendix G at A 53-71 *infra*. **Cumberland Coal Co. v. Board, 284 U. S. 23-25, 30-1 (1931)** (discrimination resulting from arbitrary valuation methods). See Leland, The Classified Property Tax in the United States 52, 58 (1928).

We invite the Court's attention to principles announced by this Court which are relevant here. In 1908 Mr. Justice Holmes wrote ". . . Neither the state courts nor the legislatures by giving the tax [here, value finding] a particular name [here, "judgment factor"] or by use of some form of words can take away our duty to consider its nature and effect." **Galveston, H. O. Ry. Co. v. Texas, 210 U. S. 217, 227 (1908).** In many cases, the Court has

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[27b] **"The tax seems sure to remain the chief source of funds for local government and hence to retain its role as a vital factor in the American federal system."** Benson et al, op cit. *supra* at n. 27a, p. 37, at p. 73.

announced that it will look through form to substance. **Williams v. Mississippi, 170 U. S. 213, 225 (1898); Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27 (1909).** This Court will analyze the facts to pass on the federal questions. **Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 149, 162, 164, 169 (1930) (value finding); Lindheimer v. Ill. Bell, 292 U. S. 151, 155 (1934) (value finding); Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 593 (1914); Fiske v. Kansas, 274 U. S. 380, 385-6 (1927); Napue v. Illinois, 360 U. S. 264, 271-2 (1958).**

4. Arbitrary State Judicial Action Finding Railroad Values While Enforcing Constitutional Mandates for Property Tax Purposes Portends Curtailment of State Administrative Processes.

We can find no decision of this Court where state judicial action in state tax uniformity litigation is challenged here as violative of the Fourteenth Amendment. Invariably the cases brought here have involved challenges to legislative and administrative action.[28] Whatever reasons there are for deference by this Court to state action the reasons for deference are less in reviewing state court judicial action enforcing constitutional mandates involving matters subject to expert administrative processes. Particularly in constitutional value finding by state courts the potential for serious error is glaring. Limited by the

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[28] Sixty-nine years intervened between *County of San Mateo v. So. Pac. Ry. Co.*, 13 Fed. 722 (1882) (D. Cal.) (Field, J., on circuit), dismissed per stipulation, 116 U. S. 138 (1885) and *Walters v. City of St. Louis, et al.*, 347 U. S. 231 (1954). During that period less than ten property tax cases came up from state courts and invariably the state court had declined to interfere with the state legislative and administrative processes. *E. g., Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923). Similarly cases coming up from federal courts did not involve challenges to state judicial action. *E. g., Hillsborough Township v. Cromwell*, 326 U. S. 620 (1945).

rigors of the adversary process the judiciary is bound by the record and the flexibility and full time expertise of the administrative process is lacking. More significantly a misstep by the state judiciary in constitutional value findings will have permanent or long range effects which can only be altered by constitutional amendment, whereas, errors by legislators or administrators are subject to easier rectification through the channels of political life. Cf. **Burrows v. Jackson, 346 U. S. 249, 257 (1953).**

The upshot is that in the type of cases now before the Court the state action below has bound the state administrative process by mandating removal of inflation in the administrative valuation process for railroad property. See Appendix A *passim*. The viability of the administrative process is thereby very much restricted if not destroyed. In short, the state action challenged here commands the administrator that the maximum valuation for railroad property cannot be increased by continuing inflation or reflect past inflation or reflect property acquisitions.[29] No other type of property taxpayer in the United States had such shelter.

What is at stake here is the application of federal constitutional limitations applied to state judicial action which at the instance of the railroads will, if arbitrary

[29] In 1963 the Director explicitly equalized railroad assessments pursuant to new legislation. The 1964 and 1965 railroad assessments distributed to Madison County were successively lower than the 1963 assessments despite vastly improved railroad fortunes. It is reasonable to infer that the Director has abandoned the formula or more probably retained its form and gradually moved to eliminate the influence of inflation in respect of judicial mandate by gradually moving "judgment factor" dollars present in 1962 above the line of the annual average as deductions from the cost factor—at the rate of 3 for 1. If the inference is correct, it follows that as railroad capitalized income and securities values increase, the reduced cost factor in time may be used as a debasing factor to render valuations less than the average of capitalized income and security values, as was the case for some railroads, 1951-1962. See Appendix E at A-31 *infra*.

or otherwise violative of the Fourteenth Amendment, render impotent the state administrative processes in valuing railroad property as inflation continues and property tax burdens continue to increase.

5. Congressional Action as Well as Constitutional Duty Impels Plenary Consideration.

Challenges to State judicial action under the Fourteenth Amendment in the ad valorem tax field are entitled to especial attention by the Court because of Congressional action. Congress has evidenced the intention that state courts handle local tax questions even though they involve federal rights guaranteed by the Fourteenth Amendment. In 1937, the Johnson Act was passed to eliminate the federal district courts (and thereby the Courts of Appeals) in matters involving local taxes unless an aggrieved party can show that the state legal machinery does not provide an adequate remedy. 48 Stat. 775 as amended, 50 Stat. 738, 28 U. S. C. (§1341(1)). If the Congressional purpose is to be effectively and fairly implemented it is imperative that State judiciaries receive the benefit and the guidance of standards which only this Court can develop in the context of the Fourteenth Amendment, particularly in matters of judicial value finding, which is requisite to enforcement of state and federal constitutional mandates of uniformity.[30]

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[30] **The questions presented have, within the month, taken on an even vaster dimension. On February 1, 1966, Federal Judge William E. Miller filed an opinion in L. & N. Rr. Co. v. Pub. Serv. Com. et al., Civ. No. 4310, Middle District of Tennessee, Nashville, Tennessee. See Appendix G at A-53-71** *infra.* **One significance of that decision is that it opens the federal courts to railroad property tax discrimination claims for invalidation of State action under the Fourteenth Amendment. If the decision stands either because it is not appealed or is affirmed, the federal judiciary is now brought to discharge value finding responsibilities. Judge Miller's disposition of the case did not require the Court to find railroad values. See A-58** *infra,* **but value finding is the next step. If the lower federal courts are to be**

6. The Judgments Below Conflict With Two Recent Equal Protection Decisions of This Court; These Two Recent Decisions Are in Conflict With a 1940 Decision of This Court; At Least Two State Court and Two District Court Decisions Are Also in Conflict With the 1940 Decision.

Whether in finding railroad values the Supreme Court of Illinois applied state constitutional mandates or Fourteenth Amendment mandates, the questions presented require consideration of conflicting decisions of this Court concerning the applicability of the equal protection clause to property tax discrimination as between state assessed railroad property and locally assessed property. The method of effecting discrimination in the cases at bar is by state judicial action utilizing arbitrarily disparate valuation methods, *i. e.*, eliminating inflation for railroad property and relying on it exclusively for locally assessed property, producing railroad levels of assessment which are arbitrarily erroneous to the detriment of the People. Such a method is proscribed by the equal protection clause. **Cumberland Coal Co. v. Board, 284 U. S. 23 (1931).**

The People's position is that the equal protection clause does prohibit arbitrarily disparate levels of assessment between state assessed property and locally assessed property—whichever direction the discrimination goes. Here,

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involved in value finding at least during the years until a case is brought here for decision plenary consideration of the questions presented here will aid in the supervision of the federal courts in the value finding process. If the federal court's action is in violation of the Johnson Act (see p. 7, infra), then the reason for substantiality here presented is still pertinent. For mention of the conflict in state and federal courts on the application of the Fourteenth Amendment in railroad property tax discrimination cases, highlighted by the February 1, 1966 decision, see pp. 43-45, infra.. Judge Miller's opinion was presented in full on pp. 6-7 of the Nashville Tennessean for February 2, 1966, under the title "Federal Court Intervention Quizzed."

the state action discriminated against the People and therefore violated the Fourteenth Amendment.

If, as a matter of definition, state assessed railroad property is of the same class as locally assessed property in deference to the law of Illinois—the postulate of the cases below—the judgments below conflict with **Hillsborough Township v. Cromwell, 326 U. S. 620 (1945)**, which held on the pleadings that state administrative action creating arbitrarily disparate levels of assessment between properties of the same class for purposes of the property tax is violative of the equal protection clause. If, however, state assessed railroad property is of a different class than locally assessed property, the judgments conflict with **Walters v. City of St. Louis, 347 U. S. 231, 237 (1954)**, which stated that:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

The Court has not applied this standard since 1954 and its application will help to clarify equal protection limitations. The People do not see anything but feigned differences which explain the arbitrary judicial exclusion of inflation from valuation of railroad property nor any relevance of such disparate treatment to distinguishing between the two properties which perhaps only differ because of a division of assessment responsibility. State action in utilizing "the judgment factors" is wholly arbitrary and conflicts with **Walters**.

Whatever the answer to the "class" or "interclass" riddle, both **Hillsborough** and **Walters** confirmed that there are limits imposed by the equal protection clause on

state action in distributing the property tax burden. Therefore both decisions are in conflict with **Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362 (1940)**, which in the strongest *dicta,* if not in holding, announced that discrimination between state assessed railroad property and locally assessed property was not prohibited by the equal protection clause.

The cases at bar can be distinguished from **Browning** which seems to deny that state action which discriminates against the People in favor of state assessed railroads violates the equal protection clause. In **Browning,** the discrimination was of long standing and was practiced by the administrative process. Here the discrimination arises from the judgment below and was affected by judicial action on a constitutional level. In any event, the substance of **Browning** has been substantially drained by **Hillsborough** and **Walters.** Questions calling for clarification of the present day vitality or moribundity of **Browning** deserve plenary consideration.

State court decisions have refused to follow **Browning. Del, L. & W. Rr. v. Neeld, 130 A. 2d 6, 9, 11-2 (1957)** (N. J.) (relief denied because of failure to exhaust administrative remedies); **Central Rr. et al. v. Neeld, 139 A. 2d 110 (1958) (N. J.)** (by implication) (relief denied because of failure to exhaust administrative remedies); *cert. denied* **357 U. S. 928 (1958); So. Pac. v. Cochise County, 377 P. 2d 770 (1963)** (Ariz.) (on pleadings). There is a growing number of state court decisions which perhaps by implication are also ignoring **Browning:** those cases cited in n. 18 *supra* at pp. 29-30, which on pleadings or otherwise hold that the railroad taxpayer is entitled to relief from disparate levels of assessment. Many of these decisions do not discuss the basis for relief.

Moreover, two federal district court decisions have refused to follow **Browning. Del., L. & W. Rr. v. Kingsley,**

189 F. Supp. 39, 46-50 (D. N. J. 1960) (relief denied because of adequate state remedies, 28 U. S. C., §1341); **L. & N. Rr. Co. v. Public Service Com. of Tennessee, Civ. No. 4310, M. D. Tenn., Feb. 1, 1966** (relief granted) (in conflict with **Kingsley**, *supra*, on adequacy of State remedies) (perhaps the first Federal District Court decision since 1937 to order relief for a railroad taxpayer under Fourteenth Amendment) (valuation of railroad property not reached). See Appendix G at A. 53, 66-68 *infra*.

Movement by railroad property taxpayers into state and federal courts within the past decade is at this time culminating a momentum which has led inexorably to reappraisal by this Court of **Browning** and reconsideration of the Johnson Act to apply Congressional intention to current railroad remonstrances. The cases at bar present questions which involve a common denominator underlying both sets of conflicts, which is Fourteenth Amendment limitations on judicial value finding. If property tax discrimination involving the railroads is to be the subject of judicial action, the cases at bar offer an approach to the applicability of the Fourteenth Amendment at the behest of the People, not the railroads. By 1966 the art of property tax administration has advanced in quality; since 1940, measurement of inequity is more precise and the judiciary with the guidance of this Court can enforce constitutional mandates with a surer hand.

CONCLUSION.

Plenary consideration of the questions presented will aid the People of the United States, contribute to the strength of local government, enhance the integrity of the property tax, and advance the proper ordering of the judicial system, state and federal, in implementing constitutional guarantees, with deference to Congressional intent as to the proper judicial forums. All this as the

American people during the next fifty years grow to the 400,000,000 mark.

For the foregoing reasons, jurisdiction should be noted and certiorari granted.

Respectfully submitted,

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February 19, 1966.

APPENDIX A.

In the Supreme Court of Illinois.

(Nos. 38859-38904.—Reversed and remanded.)

The People ex rel. George Musso, County Collector, Appellee, v. Chicago, Burlington & Quincy Railroad Co. et al., Appellants.

Opinion filed June 24, 1965.—Rehearing denied Sept. 27, 1965.

Appeal from the Circuit Court of Madison County; the Hon. James O. Monroe, Judge, presiding.

Burroughs, Simpson and Burroughs, of Edwardsville, and R. T. Cubbage, T. G. Schuster, and John H. Bishop, all of Chicago, (Eldon Martin and C. W. Krohl, of counsel,) for appellant Chicago, Burlington & Quincy Railroad Company.

Hugh J. Dobbs, of Springfield, T. G. Schuster, of Chicago, and James R. Parham, of East St. Louis. (James N. Ogden, Louis F. Gillespie, Eldon Martin, Jordan Jay Hillman, George M. Hollander, Gillespie, Burke & Gillespie, Pope & Driemeyer, Peter Herzog, Coburn, Croft & Kohn, Wayne P. Williams, Walker & Williams, John F. McCarthney, Gordon Burroughs, Robert E. Eggmann, Roberts, Gundlach, Lee & Stubbs, John F. Schlafly, and Schlafly, Godfrey & Fitzgerald, of counsel,) for other appellants.

Joseph R. Bartylak, State's Attorney, of Edwardsville, and Burton C. Bernard, Assistant State's Attorney, of Granite City, (Dick H. Mudge, Jr., of counsel,) for appellee.

Mr. Justice House delivered the opinion of the court:

Twelve railroads filed objections to taxes levied against their operating properties in Madison County for the years 1957 to 1962 inclusive, and seek a return of that portion of the taxes paid under protest. They contend that their Illinois property was assessed at full value while the equalized value of locally assessed property did not exceed 55% of full fair cash value in any of the tax years involved, and that the discrimination is so gross that it is constructively fraudulent against them.

The objections were consolidated for hearing by the circuit court of Madison County. It found that locally assessed property, after equalization, had been assessed at county-wide levels from 48.14% to 51.40% of fair cash (full) value, that the railroads properties were likewise undervalued at 58% to 85% of full value and that the disparities were so great as to constitute gross discrimination against objectors. The refunds ordered were not in dollar amounts but in percentages and the parties were to make the computations. The measure of refund was the difference between the railroads' taxes and the amounts they would have paid if all property in the county had been assessed at full value. The amount of each such refund was limited by (a) giving effect to any other refunds (from excess rates and the like) and (b) the amount of the protest. Jurisdiction was retained to approve or correct the computations and to "implement" the process of refund. The railroads perfected these 46 appeals directly to this court. The Collector has not appealed from the orders finding the percentage debasement of locally assessed property, nor has he cross-appealed from the findings of gross discrimination against the railroads or the orders for refund.

This is the second case in the series of railroad objection cases which have not contested the debasement of locally

assessed property as disclosed by the ratio studies of the Department of Revenue. (See **People ex rel. Korzen v. Chicago, Burlington & Quincy Railroad Co.**, Docket No. 38942). The only issue, therefore, is whether the railroads' properties were assessed at full, fair, cash value for the years in question. This should involve only a question of fact, to be viewed in the light of the law as developed and crystallized through a succession of these cases. While the Collector recognizes and appears to accept the principles developed in **People ex rel. Hillison v. Chicago, Burlington and Quincy Railroad Co.**, 22 Ill. 2d 88; **People ex rel. Kohorst v. Gulf, Mobile and Ohio Railroad Co.**, 22 Ill. 2d 104; **People ex rel. Dallas v. Chicago, Burlington & Quincy Railroad Co.**, 26 Ill. 2d 292; **People ex rel. Wenzel v. Chicago and North Western Railway Co.**, 28 Ill. 2d 205; **People ex rel. Enrietta v. Gulf, Mobile and Ohio Railroad Co.**, 29 Ill. 2d 605, and earlier decisions, there is woven into the fabric of his argument in applying the law to the evidence the constantly recurring theme that the Directors of Revenue have, since 1949, sought to do equity through debasement of railroad values by the application of their judgment and thereby "hold the line" against widening the gap between State assessed railroad property and locally assessed property. Thus, while giving lip service to our approval of valuation methods (in some cases the same railroads' objections were before us for the same years here involved), the net result is an indirect attack upon those methods.

This whole argument is predicated upon the theory that in the prior cases the background evidence was insufficient to reveal the valuation methods at the State level over an extended period of time. In counsel's language: "The magnitude of the new explanatory evidence and the insight it permitted led the trial court to a consideration of several legal points which this Court was not called upon to confront in the four prior cases [**Hillison, Kohorst,**

Wenzel and **Enrietta**] because of the limited records, including the presumption of constitutional compliance by the Directors."

There has been offered by the Collector much evidence by way of exhibits, some or all of which were not presented in one or more of the previous cases. For example, the ten annual reports of the Illinois Tax Commission covering the period 1933-1942 are in this record while the first five of such reports were not previously included; data sheets for all Illinois railroads from 1951 to 1963 are in evidence and in previous cases only those of the subject carrier and subject years were introduced, although expert testimony was predicated upon examination of all such sheets. In addition, annual reports of the Department of Revenue since 1945, annual reports to stockholders of various railroads, railroad information schedules returned to the Department, United States census data, Interstate Commerce Commission reports and procedures, graphs based upon exhibits and other documents have been offered. Many of the same exhibits have been introduced by both parties. Objections have been made by the railroads that some of the literature, price indices and other materials were never admitted in evidence. A stipulation provides for the admission of evidence without a foundation being laid and is sufficiently broad to encompass almost any public document, although it contains the limitation that all were subject to objection as to relevancy, materiality or competency. There is no point in ruling on each exhibit. It is sufficient to say that out of this welter of exhibits, making a record of gargantuan proportions, we have considered only those in the record or those of which we may properly take judicial notice.

The Department of Revenue took over railroad assessment and valuation duties of the Illinois Tax Commission subsequent to the adoption of the Revenue Act of 1939. During the taxable years in question and earlier, section 80

of the act, (Ill. Rev. Stat. 1961, chap. 120, par. 561,) provided that the Department determine and assess at fair cash value the operating properties of the railroads in this State. In doing so it was to take into consideration the market value of stock, bonds and other applicable indebtedness for the preceding 5 years; the net earnings for the preceding 5 years, "and such other information as the Department may consider as bearing on the fair cash value of the property: Provided, that the facts hereinbefore named shall not be conclusive upon the Department in determining the fair cash value of the property of a railroad company." The method used by the Department under this statutory directive is explained and illustrated in **Chicago and North Western Railway Co. v. Department of Revenue**, 6 Ill. 2d 278, and **Chicago, Burlington & Quincy Railroad Co. v. Department of Revenue**, 17 Ill. 2d 376.

Three evidences of value: capitalized earnings, market value of stock and debt, and reproduction cost less depreciation have been in use, in varying degrees, at least since 1933. The Tax Commission's report for that year, commenting upon methods used to determine system values named the following: (1) original cost plus additions less depreciation or reproduction cost less depreciation; (2) capitalization of net earnings; and (3) stock and bonds value. It went on to say, "These three methods of valuation condition and limit each other so that a fourth method, which is a composite of the above or a weighting of the various factors previously enumerated, ought to be identified. The composite method rests upon the theory that no one valuation formula is satisfactory and that true values can only be determined by a consideration of all of the elements above enumerated. * * * Primary emphasis, it is believed, should be given to earnings and stock and bond quotations in the valuation process. It is felt that these are a better reflection of the current market value of a railway than original cost." It will be noted that

the formulaic result obtained by taking the average of the three valuations was not recommended. Furthermore, subsequent annual reports show conclusively that the three factors were not given equal weight. (For example, railroad valuations varied from 58% above the straight average in 1933 to 1% below such average in 1939.)

The reports of the Tax Commission for 1939-1940 again referred to the three factors, pointing out the strengths and weaknesses of each. While recognizing the desirability of a formula, the use of judgment was said to be necessary in the following language: "The development of rules of procedure for analysis of pertinent data, therefore, evidences an improving standard of administration. Such a tendency does not necessarily imply the abandonment of all non-measurable elements of judgment and reduction of the process of arriving at an assessment to a mechanical formula. All through the process of determining an assessment the necessity for utilizing judgment arises, and in the final summary the 'tangled impressions' act directly upon the result." (The term "tangled impressions" refers to Mr. Justice Holmes description of the process of arriving at valuations in **Chicago, Burlington & Quincy Railroad Co. v. Babcock**, 204 U. S. 598, 51 L. ed. 636, where he said, "They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth.")

The Commission's last reports for 1941-1942 referred to the current upswing in railroad earnings and though stating that other factors (stock and debt and reproduction cost) were considered, nothing is said to indicate the use of a fixed formula.

The 1943-1945 combined reports by the Department and those for 1945-1949 shed little light on assessment methods. The latter indicate that the 1946 and subsequent railroad

assessments were made in accordance with the full value assessment legislation adopted in 1945, and state, perhaps significantly, "Departmental assessments were made and certified to the local taxing districts at full value." Counsel for the Collector concedes that there is little available documentary information of the use of a formula during the 1940's and none after the early 1940's, except for a memorandum by Lynn A. Stiles dated January 28, 1949 (which was not then admitted), but which Stiles referred to when he testified. He stated that the formulaic approach (average of the three factors) was closely followed in the years 1943-1949. However, his recollection was that the assessments varied 5% or 10%, plus or minus, from the formula and conceded "* * * but I would be more comfortable in recollection with a ten percent spread in (sic) either side."

The historical background does not support the Collector's thesis that a straight formulaic arithmetical approach has been adopted. It shows rather that judgment, whether designated by that term or not, has always been used in the valuation process. We now proceed to examine the evidence which according to the Collector's theory, establishes a "hold the line" policy since 1949.

Harry L. Hulman became Deputy Director of the Department of Revenue in 1961 and Director in September 1963, and participated in railroad assessments in 1961 and 1962. In both years a judgment factor was applied to the formulaic result. A total railroad valuation was fixed at 1 billion 32 million dollars for 1961 and at 999-plus million dollars for 1962. The judgment factor was said to vary among the railroads to achieve those total figures, not in an effort to keep the assessments level but to determine proper assessment. For the first and only time, so far as we are aware, the phrase "hold the line" was used when Director Hulman said, "* * * and more or less arbitrarily we took the figures and tried to hold the line as close as

we could to the 1960 assessment until such time as we could delve into railroad assessment further and make a study of it". He testified that he examined all of the data sheets and that no one in the Department abused their responsibility in making the 1961 and 1962 assessments. He also testified to the method of assessment he used in 1963 to implement the 1963 amendment to section 80. The amended section is the same as heretofore quoted except that the Department is now to apply an equalization factor to full value, which factor is the State-wide average ratio of assessed value of locally assessed property to the full value of locally assessed property. He stated that he used the straight formulaic average of the three factors (without application of a judgment factor) and then applied a 50% equalization factor. This method is, of course, not in issue here, since it was used in a year subsequent to the years for which objections were filed and being heard in these proceedings.

Edward F. Koncel, who had railroad tax background, succeeded Raymond L. Danis as Supervisor of Railroad Assessments in November 1960 and worked up the rail valuation figures for 1961 and 1962. He was familiar with methods Danis used in 1959 and 1960 and he used the same methods of arriving at valuations in the two subsequent years. He testified that the assessments were at full value and in reply to a question as to whether the findings of full fair cash value by the Department debased or equalized its railroad assessments he said "no". He stated that the small reductions of railroad assessments in 1961 and 1962 were less than the decline of all three indicators of value, or any one of them.

Leo Cohen, Professor of Economics at Southern Illinois University, testified as an expert for the Collector. He recognized the possibility of corrections within each component factor, but when the three were added together and divided by three, thereby producing a straight average,

he stated that judgment should not be applied. He does not say that full value was never attained but says that in his opinion the application of the judgment factor was wrong. In summary, he has his own theory of how the valuations should be obtained, which is different from that used in Illinois and approved by this court.

We have heretofore commented upon the evidence of former Railroad Assessor Stiles. Professor Rolf Weil testified in behalf of the Collector but only with respect to valuation of locally assessed property, which is not here in issue.

As pointed out by Collector's counsel the primary sources of information from 1949 to 1960 are the data sheets and the testimony of Raymond S. Danis. Danis worked for the Department of Revenue and its predecessor the Tax Commission from 1933 until his retirement in 1960. He was Railroad Assessor for 2 years and then became Supervisor of Railroad Assessments, later known as Railroad Assessment Supervisor. It was his duty to arrive at a valuation which was then recommended to the Director for final assessment. The director usually used his valuation as the assessment figure with minor adjustments. Upon final assessment it was his duty to certify the assessments to the counties. He testified that the method of arriving at railroad property valuations was practically unchanged from 1933 to 1960 except for a minor change which will hereafter be referred to. The statutory factors of capitalized earnings and market value of stock and debt were used together with cost of reproduction less depreciation. The average of the three factors was then taken to guide in the appraisal. Other information considered relevant was taken into consideration and applied to such average in the exercise of what he said was commonly called "the judgment factor", and that such judgment factor has always been applied. He testified unequivocally that to the best of his judgment the

valuations fixed by him were the full fair cash value of each railroad in each year.

Danis made a minor change in procedure in 1957. The judgment factor was applied to the straight average until that time, but he then inaugurated a new type of explicit adjustment to the cost factor by a reduction for obsolescence (in addition to one for uneconomic property) before applying a final judgment factor to the average thus obtained. He is criticized by Collector's counsel for making reductions from the formulaic averages after the explicit reductions were made. It is also inferred that his testimony in the several cases over the years has been inconsistent. No foundation was laid for impeachment of Danis and he was not in fact impeached. A careful reading of this man's testimony indicates no evasion, and surprisingly few discrepancies in his testimony in this case, or between his testimony in the several cases, considering the magnitude of the subject matter covered.

Charles M. Chapman, an expert in this field, was familiar with railroad valuation methods in Illinois and said that the three factors were used in some other states with emphasis upon capitalized income. He stated that every tax assessor is expected to exercise judgment. He was particularly critical of any extensive use of reproduction cost because price indices indicate that some items of property rose 300 percent or more of original cost since World War II. He said that cost, in any form, necessarily represents value only at the time of construction. Original cost probably must have been justified or the line would not have been built, but when the returns do not justify the investment there is a constantly increasing variation between the value and historical cost, and the gap becomes even wider by applying current prices to reproduction new.

Broley E. Travis, a consulting valuation engineer, expressed the opinion that it was sound appraisal practice to

adjust an arithmetical result, and that based on the chart the 12 Madison County railroads were assessed at least at full, fair cash value between 1951 and 1962.

H. Clyde Reeves, with wide experience in the railroad valuation field with the State of Kentucky, was also critical of giving any substantial weight to reproduction cost and approved the use of judgment. He testified that if a formula incorporated Interstate Commerce Commission valuations as substantial indices of value, that a substantial judgment factor must be used "to get them out". As to the Gulf, Mobile and Ohio Railroad 1959 assessment it was his opinion that it was on the high side of tolerance.

Over the years the composite assessment figures for all major class I railroads in Illinois show a variance of over 100 million dollars and the assessed value of the 12 lines here involved varies in about the same proportion. The charts based on the assessment figures for these roads each show considerable variance and they vary widely from road to road. In some instances the curve of one is upward while the curve of another is downward. In comparing assessments of Class I railroads in a particular year with those of the year immediately preceding many changes are found. For example, from 1951 to 1952, 14 were increased, 4 decreased and 4 remained unchanged, with a high percent of increase for one railroad of the group of 12% and a high percent of decrease of 1%; from 1956 to 1957, 28 were increased, 4 decreased and 5 remained unchanged, with a high increase of 6% and a high decrease also of 6%. The figures for the other years between 1950 to 1957 were in about the same proportions. Thereafter to 1960, the number of decreases was pronounced. The charts, and the figures upon which they are based, refute any argument that a static level of assessment was maintained.

All parties agree that of the three indicators of value reproduction cost less depreciation has been the most un

stable, and the exhibits fully bear that out. After World War II such cost skyrocketed upward until it reached the astronomical figure of $2,162,197,000 in 1963, even after the Interstate Commerce Commission figures had been revised by the Department of Revenue by further reducing the condition percentage used by the Commission and applying the explicit adjustments for public improvements and obsolescence. This compares with a capitalized income value of $728,228,000 and market value of $877,776,000, both of which indicators had remained fairly level. If the cost factor is averaged equally with the other two (⅓ each), the relative weight of each factor to the straight average produced would be: cost 57.38%, market 23.29%, and income 19.33%. The charts of the 12 railroads involved depict the influence of the reproduction cost factor. From 1951 to 1958 the market factor line was lowest with the income factor slightly higher. The lines then crossed and the market line was slightly higher. The same is true of the average of income and market which was fairly level around the $500 million mark. The level of assessment was higher at all times except for the period from 1954 to 1957 when the income was temporarily higher. During the same years the reproduction cost line rose from about the $1 billion mark and in a relatively steady manner until it reached approximately $1½ billion. This cost factor, of course, raised the straight average of the three from just under $700 million to about $900 million before dropping back in 1958. A further comparison may be drawn from the data sheets of one of the railroads (the Burlington) for the same period. Income declined from a high of $155,355,000 in 1952 to a low of $100,595,000 in 1962, market value increased from $112,475,000 in 1951 to a high of $139,027,000 in 1958 and then steadily declined to $123,973,000 in 1962. Reproduction cost increased from a low of $219,050,000 in 1951 to a high of $336,645,000 in 1958, then receded gradually to $315,165,000.

The application of judgment or use of a judgment factor was recognized in the **North Western** case (6 Ill. 2d 278), the **Burlington** case (17 Ill. 2d 376), and **Kohorst**, and was given specific approval in **Hillison**. As was said in **Enrietta**: "A careful review of the entire record leads to the inevitable conclusion that judgment must be used by appraisers in the intricate problem of arriving at an assessed valuation of a railroad, whether it be by using various factors, then applying the judgment factor as is done in Illinois, or the choosing of a percentage for capitalizing net operating income and the fixing of the percentage weight to be given the reproduction cost factor. The Department has chosen a method to carry out the statutory mandate and has used it for many years. The method has received the tacit approval of this court in a number of cases (Cases Cited)", 29 Ill. 2d 605, 608. We are not disposed to change those views.

Nor can we say that those in the Department who were responsible for fixing railroad assessments abused their authority in the application of judgment. They certified that the resulting assessments were at full value and the Railroad Assessment Supervisor testified that to the best of his judgment they were full value assessments. This evidence is not refuted. True, the record amply discloses that a formulaic or straight average of the three factors was not followed, but that does not solve the problem. The issue is whether the final assessments were at full value based on the two explicit statutory factors and such other information as the Department considered as bearing on fair cash value.

The parties have presented an argument which is difficult to follow. The railroads charge that the courts have no power to review or determine the value of property fixed by the administrative officers in the absence of fraud, actual or constructive, and that if they invade that field there is a violation of section 1, article IX of the consti-

tution. Apparently this is based upon the fact that the Collector did not allege fraud on the part of the Department through the alleged undervaluation of railroad property. But the railroads did charge constructive fraud, and it follows that it was necessary for the court to consider whether there was a debasement of locally assessed property and similarly whether there was debasement of railroad property in order to determine whether there was discrimination and, if so, whether the degree of discrimination was so gross as to amount to constructive fraud. We do not have to pass upon the question of whether the trial court exceeded its authority in finding the exact degree of discrimination and ordering refunds based on such findings in view of the holding in this opinion.

It would also be futile to discuss whether the former cases are *res judicata* or whether the rules of collateral estoppel apply. Only a fraction of the railroads here involved were parties to the prior cases and all are parties to this consolidated proceeding which is being decided as a unit since the proof applies to all.

Much of the record in **People ex rel. Korzen v. Chicago, Burlington & Quincy Railroad Co.**, No. 38942, which involved evidence of sales of other railroads between 1947 and 1961 in an attempt to show the Department's railroad assessments to be less than full value has been introduced in this proceeding. The holding of incomparability in that case is controlling here.

In summary, the formulaic approach has never been adopted in this State and in fact has not been used. The judgment factor has been applied for a number of years and its use has been recognized and approved by this court. The record does not support the Collector's oft-repeated theory that in the use of judgment the Railroad Assessment Supervisors and the Directors abused their authority by debasing valuations in an effort to "hold the

line". We hold that the proof establishes assessments of the railroads at substantial full value and that objectors are entitled to the refunds prayed for rather than refunds fixed by the trial court, which in each case was to be computed upon the straight average formulaic result without application of the judgment factor.

The judgments of the circuit court of Madison County are reversed, and the cause is remanded with directions to order refunds in conformity with the method outlined in the **Hillison** and **Kohorst** cases and subject only to the same limitations there fixed.

Judgments reversed and causes remanded, with directions.

APPENDIX B.

In the Circuit Court of Madison County, Illinois.

STATEMENT BY TRIAL JUDGE OF REASONS FOR DECISION*

This case involves the effort of counsel and Court to dispose of tax litigation pending as long as seven years. The delay has been due to the death of one of the principal attorneys after part of the litigation had begun, to preoccupation of the County Court with other matters, to an arms length and standoffish attitude of counsel for both sides, to the lack of regular judicial statistics and administrative devices focusing on case backlogs, and to the inattention and lack of interest inherent in the non-supervised court system prior to January 1, 1964.

The review of case statistics accompanying the transition to the new court system under the Judicial Article effective in 1964 focused attention on the tax case backlog. Flexible administration possible under the new unified court permitted the assignment of one judge more or less full time to the problem. And counsel for both sides have responded with enhanced attention and interest.

Proceedings.

Tax objections of thirteen railroads were involved for tax years 1957, 1958, 1959, 1960, 1961 and 1962. The aggregate was 52 separate "cases". The multiplicity and complexity were in large part eliminated by several devices. 1) Additional parties in some of the cases were added by voluntary entry of appearance or by appearance requested by the Court and made binding after certain preliminary proceedings. 2) All of the cases thus brought

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* [Notes are at end of Statement.]

together were treated as one consolidated matter through merger and stipulation that one determination could be made on the primary issue inherent in all the cases, with this determination, modified appropriately, to take effect in regard to each individual controversy. 3) A comprehensive stipulation was made by counsel for the admission of many official documents without technical foundation. 4) The evidence of several witnesses was taken outside the county on three trips to Chicago and one to Springfield, with the trial judge accompanying counsel so that objections could be decided on the spot and return trips eliminated. 5) Hearings were expedited. 6) Full briefs and memoranda were received in a most informal way including oral and letter responses, giving counsel maximum time for presentation of views without the time-consuming effort of answers and replies.

The offerings were voluminous. There were some 150 exhibits for the Collector and 106 for the Objectors. In all, 26 witnesses testified, including those by depositions. Depositions from other cases were brought in. Documents ranging from economics and accounting to railroad operations were presented. Some of this struck the Court as unnecessary, since it involved matters of which the Court could have taken judicial notice or which it could have found in any good library.[1]

Generally all evidence which had any substantial pertinence and probative value was admitted, under the rule that a trial judge deciding a non-jury case will disregard improper evidence.[2]

From all the evidence, the Court has sought: a) some guarantee of authenticity, such as the official nature of a document, the personal observations of an occurrence witness, or the expertise of an expert giving his opinion; b) some insulation against corruption, so as to preclude speculation, hearsay, self-serving statements and other un-

reliable evidence; c) some substantial pertinence to the inquiry; and d) some probative value. These requirements led to the Court's urging counsel to select from the vast mass of evidence what counsel considered pertinent, with some statement of reliance on this.

Under the prevailing tax law the Court has indulged in the presumption that taxing authority personnel have properly performed their duties. The Court has viewed this presumption as rebuttable at both the state and local tax levels. It has also indulged in exceptions to the best evidence rule, permitting witnesses to summarize the contents of massive documents and to tabulate or epitomize these conclusions; exceptions to the hearsay rule, permitting official government document entries; and exceptions to the rule against opinions and conclusions in the case of experts.

The Objectors made broad and continuing objection to both main lines of evidence presented by the Collector, that tending to rebut the Objectors' evidence of sales assessment ratio studies showing under-assessment of local property, and also that tending to rebut the Objectors' evidence of 100 per cent assessment of railroad property by the state revenue department. Regarding local assessment, the Objectors' evidence was the more weighty, the Collector's was not dispositive, and its admission was not critical. Regarding state assessment, the Collector's evidence was more weighty and dispositive so its admission is in point.

Objection to the Collector's evidence of state assessment was on three broad grounds: 1) that the Court has no jurisdiction to inquire into the matter; 2) that the matter was closed by collateral estoppel or res judicata; and 3) that the Collector was impeaching his own party or witness. The evidence was admitted subject to motion to strike and the objection and motion were taken with

the case. For reasons detailed below, the objection was overruled, the motion to strike denied, and the evidence admitted.

First, the term "jurisdiction" as involved here is **not** used to connote **authority** to sit, **nor right** to conduct an inquiry, **nor power** to make a determination. These things are not disputed: indeed, the Objectors ask that the Court assert its power in their behalf. Rather the term "jurisdiction" here means **warrant** or **justification** or **cause** to act if the party seeking relief makes a proper case, much as the term is used in the sense that "equity has (or has not) jurisdiction" to grant relief in a proper case; in other words, simply whether there is a **cause of action**.

When with this view is coupled the idea of administrative validity, the view is reinforced. Administrative actions are presumptively valid (though the presumption is rebuttable). And, it is said, unless an administrative finding of railroad valuation by the state revenue department is actually, expressly or constructively fraudulent, there is no "jurisdiction" to review it. All this really means is that, lacking fraud, 1) the administrative finding is presumptively (though rebuttably) valid, and 2) there is no **warrant, justification** or **cause of action** to set it aside. This is what the courts have actually held, however somewhat loosely they have used the term "jurisdiction".

Given jurisdiction in the sense of the authority, right and power to act, the court may of course inquire into the validity of the administrative action (presumed or rebutted) or to any alleged constructive fraud, regarding **both** local and state administrative findings.

Second, the Objectors alleged and made an issue as part of their constructive fraud case the contention that (state railroad property assessments were at 100 per cent of full

fair cash value while other (local) property assessments were at not more than 55 per cent. On both points the Objectors offered much evidence. Now to claim that the railroad assessments are items closed by res judicata or collateral estoppel is to preempt half the inquiry and beg one of the two major questions made issues in the case.

The claim is not well based, even in inference. It lies with cases in which the railroads claimed their state assessments were excessive—more than 100 per cent.[3] But the Supreme Court in holding otherwise did not say they were not less than 100 per cent. The first such case reversed a judgment that the assessment was excessive, holding in effect that the assessment was **not more than 100 per cent.** The second discussed the factors and affirmed a trial court remandment to the department for reconsideration on the factors as clarified by the high court opinion, which said in effect that the assessment **might or might not be more than 100 per cent.** Obviously, what is not more than 100 per cent, or what might or might not be more, **could very well be less than 100 per cent.**

Wholly aside from this, it should be observed that except for rare cases, the State is never estopped.[4]

Third, regarding state assessments, the State, the People or the Collector as their agent had only one position and one approach in the evidence here—that the Objectors had not shown 100 per cent assessment of railroads. The Collector's evidence was consistent with this position. His witnesses were consistent with it. That the Objectors relied on testimony of state-employed witnesses or state-prepared documents is not material. Such evidence was admissible but not conclusive. The Collector could refute such evidence without impeaching himself or his principal or his witnesses—just as a corporation could show that its officer acted ultra vires, or a principal could show that an agent acted outside his authority.

Presumptions.

We begin with two presumptions, at two levels: a constitutional[5] presumption that all taxes are to be uniform, whether assessed at state level or at local level: and a statutory[6] presumption that all property is assessed or valued for tax purposes at its full fair cash value, again whether assessed statewide or locally.

The Collector suggests that the two presumptions may work somewhat against each other: i. e., that whereas 1) a statutory requirement of full assessment at all levels, and a frank recognition by the legislature[7] and by the revenue department and local assessors that this requirement is largely and widely ignored, calls for equalization among counties and relief here from inequities between statewide railroad assessments and lower local assessments; nevertheless, 2) a constitutional requirement of uniformity indulged by the state revenue department through adjustments of its railroad assessments to "hold the line" considering such factors as inflation and rises in reproduction costs, and commensurate with the debasing of valuations it has found at local levels, constitutes "implicit equalization" already in the figures, making further relief unnecessary and unwarranted here.[8] The Collector asserts this "implicit equalization" is achieved by the department through a gross, unwarranted, ad hoc, and even unarticulated reliance on market value (of stock and debt) and income (capitalized earnings) and an under-reliance on reproduction cost as factors in determining true value. The Collector backs his claim with an elaborate and documented historical approach, which is well taken but not alone relied on here.

The Objectors say that locally the presumption of full fair cash value assessment (100 per cent) can in any case be and has in this case been rebutted. But they say that at state level the presumption has in this case not been and could in any case not be rebutted.

Regarding local assessment, the Court must agree. Regarding state assessment the Court must differ. If the presumption is, as the Objectors say, rebuttable at local level, why not statewide? (Are state officials so much more immune from pressure, so much more competent, so much more pure than local officials? Recent indications, regarding high state officials of both major political parties, would hardly warrant such a claim.) If a rule of law applies for one litigant, why not for another in the same case? (The Collector here of course claims at state level the same rebuttability as the Objectors claim at local level.)

The law on presumptions is in accord with this reasoning. The presumption involved here—that assessing officials do their duty—is not a conclusive rule of law, but (by the Objectors' own reasoning, at local level) a presumption of fact, rebuttable. As a matter of law, it could be rebutted.[9] As a matter of fact, it has been rebutted.[10]

Nature of the Evidence.

That it is the state revenue department which finds local deviations from full assessment supports claims of debasement at local levels and makes the findings a kind of admission against the State's (hence the People's or Collector's) interest. The statutory provision for this determination of the extent of local debasement is the result of the legislature's recognition of what virtually every sophisticated observer may know already—that property assessments in Illinois are seldom if ever at full value. At local level, in this case, the fact of such debasement is not even disputed—only the extent. Such a recognition, such a lack of dispute about it at local level, should make suggestions of similar debasement at state level more acceptable, not to say more realistic and compelling.

The "admission" against State (People and Collector) interest, the admission of local assessment debasement,

carries considerably less weight as a standard admission when it is realized that the department in finding local deviations from full value is not volunteering but statute-bound[11] to seek them, and is criticizing not its own personnel but local personnel when it says they did not follow the full-value assessment requirements of the law. The department findings are not striking or even unusual, and they gain their standing to refute the presumption not as declarations harmful to the declarant and hence not to be made unless true,[12] but as part of a statutory process called for by the well recognized realities of Illinois tax assessment.

There are similar realities at the state level.[13] The department is apparently undermanned. The data is supplied by the taxpayers, not independently checked. Inspection or appraisal valuation beyond such data would be a monumental, not to say superhuman job. Lacking such valuation relegates assessment personnel to taxpayer data and to factors such as market value, income, and reproduction cost. Sales data similar to that available regarding marketed property at local levels is rarely available regarding railroads, because they are seldom sold and when sold at all are moved not in a free market but in controlled conditions. State department assessments described by department assessors as full fair cash value would not likely be described otherwise, by them—who expects a state official solemnly to certify that he did not do his duty? Far from having the reliability of an admission against interest, the assertion by a state department assessor that he or his department assessed at full fair cash value has thus instead the dubious nature of a self-serving statement. In addition, the submitted testimony from other cases probing whether state assessment was at full value was largely in the nature of conclusions, in answers to leading questions.[14]

Thus, generalizing too grossly for the subtleties involved but simply enough for clarity: 1) the evidence of full fair

cash value assessments at local level was little more than the presumption, and this was refuted by massive evidence reliable of itself and confirmed by the fact it was the product of recognition by the state legislature, the state department, and the state's local agencies that local assessment was generally less than full fair cash value (the equalization being only how much); 2) the evidence of full fair cash value at state level was little more than the presumption and the claim by the department—repeated over and over, but time and again conclusion and self serving. This was rebutted by the extensive study from the department's own figures. (Exhibits 69 and background exhibits), refuting on this basis the department witnesses' self serving conclusion. Thus, the presumption of full fair cash value assessment was rebutted at **both** local level and state level. How this was effected is shown below.

Local Assessments.

The Objectors introduced through the witness Garber voluminous evidence prepared by the Department of Revenue showing the ratio between assessments of locally assessed property and the sales price of such property. This evidence was presented in great detail, showing the procedure in the field for gathering data, the mathematical and statistical procedures and safe-guards, the means of weighting and finally the specific data for Madison County, even by townships (Objectors' Exhibits 1-14). This was all epitomized in a compilation (Objectors' Exhibit 15) showing the ratios from 1953 through 1960, the last year available, and covering four of the six years involved here. These data support a finding that local property in Madison County was assessed at about 50 per cent of its sale or market value.

Objectors' Exhibits 16 through 25, and Objectors' Exhibit 39, lend some support to these assertions.

Objectors' Exhibit 93, sub-numbers 1 through 33, are in effect more 30.1 cards for assessment sales ratios for certain Madison County property, supposedly all the property sold at above $20,000 for 1957 through 1960. These cards further buttress the showing of approximately 50 per cent tax assessment level.

Objectors' Exhibits 96, and sub-numbers, 97, 98, 99 and 100, indicate that this array includes commercial and industrial property.

Objectors' Exhibits 101 and sub-numbers, and 102 folio, further support a finding of Madison County assessments, in these cases commercial property in Collinsville, at about 50 per cent (some of them up to 60 per cent).

The Objectors' witness, Weil, after examining the sales ratio study results, testified at length and to the ultimate effect that other property in Madison County was assessed at just less than 50 per cent (May 25-26, Rec. pp. 366, 400, 445, 485; see also pages 492, 493 and 572).

The Collector presents evidence regarding local assessment of the same official character as that used by the Objectors regarding railroad assessment by the state, namely, official certifications of the Department. These would show local property assessed at approximately 60 per cent (Objectors' Exhibit 33a). This evidence has the same official authenticity, but is subject to the same limits and reservations in detail as the Objectors' exhibits of railroad assessments at state level.

The Collector also undertakes to show Madison County property is in total valuation more than 30 per cent industrial, and unique in this respect, and that Department sales ratio studies being essentially residential are not as probative as they should be. Objectors' evidence (Exhibits 96 through 100) is to the contrary, that the ratio studies did include commercial and industrial properties. At best for the Collector, this point is negative.

The Collector claims over-all a showing of local assessment at from 60 to 72 per cent of value. On the evidence, the claim is not well taken, the presumption is rebutted by the Objectors' evidence, and the greater weight of the evidence shows local assessment at about 50 per cent of full fair cash value (See especially Objectors' Exhibit 15).

State Assessments (of Railroads).

The Objectors claim that railroad property including theirs has for the period in question been assessed at 100 per cent of its value. They find some basis for this claim in official documents including annual reports of the Department of Revenue, the Department's notices of assessments, and its letters of assessment; in similar letters for prior years; in an order of this court for one railroad in 1957; in the presumption that assessing officials charged with assessing at full fair cash value actually did assess at full fair cash value; and in the testimony of witnesses Koncel, Travis and Reeves, and the deposition evidence of witnesses Danis and Chapman, plus additional depositions of Koncel and Reeves.

Collector's Exhibits 37a, 37b, 37c, 37d, 37e, and 37f are the Department's published notices of assessment of various railroads including those involved here. Objectors' Exhibit 38 and sub-numbers are the Department's certificates of assessment for the comparable years. Objectors' Exhibits 42, 43, 44, 47, 48, 59, 60, 94 and 95 (including some sub-numbers) are letters from the Department to the railroads or related items regarding the assessments published in the official publications. These documents use the phrases "original full assessed valuation", "full assessed valuation", "final assessment", and "full valuation State assessed." They use these phrases in connection with the figures given for the respective railroads for the respective years. They do not give detail nor any item basis for the result, but they are the deter-

mination of the Department, which may be called an opinion, conclusion, or finding. The inference claimed is that in each case the figure is 100 per cent of value.

Annual reports of the Department and its predecessor body the Tax Commission (Collector's Exhibits 1 through 39) give some background on the State assessment process.

Objectors' Exhibit 46, the order of this court (before unification under the Judicial Article called the County Court) uses the phrase "full fair cash value" for one railroad for one year.

The witness Koncel, the revenue department assessor, testified (July 20, Rec. 2593, 2610, 2611) that the Department found "full fair cash value" for all railroads. The same phrase is used in Objectors' Exhibit 71 (pp. 10-11), Objectors' Exhibit 72 (p. 16), Objectors' Exhibit 73 (pp. 9, 10), and Objectors' Exhibit 74 (pp. 8, 9, 22), which are depositions of the same witness taken in other proceedings in Sangamon, Kankakee, Montgomery and Lawrence Counties. The witnesses Danis, Travis, Chapman and Reeves used similar phrases, likewise in conclusion-type testimony.

This evidence, in the view of the Court, is a massive accumulation of conclusions.

"It is the duty of the Department of Revenue to assess all railroad property, other than non-carrier real estate, at its fair cash value" (Ill. Rev. Stats. 1957, ch. 120, § 561). "(T)here is a presumption of statutory compliance" with this duty, in a case **where "there is no evidence** in the record to overcome the presumption and proof . . .", such as the Kohorst case.[16]

What about the case where there is evidence to overcome the presumption and proof? That is the case here.

The presumption incorporated in the Kohorst case that Department personnel complied with the statutes and

therefore assessed at 100 per cent of full fair cash market value was applied in that case because 1) it was backed by proof and 2) there was no evidence to rebut the presumption. In this case, however, the proof is weak, and there is evidence—evidence which not only rebuts the presumption (which falls upon the presentation of evidence),[17] but stands on its own basis.

The Collector here, instead of showing Department determinations (opinions, conclusions or findings) and undertaking to justify, sustain or rationalize this by mere reference to some detail, went the other way. The Collector started with the detail, applied and explained a mathematical process, and built the result. It used the same original data as that available to the Objectors, the assessment data sheets of the Department for the years 1951 through 1962 (Collector's Exhibit 60).

Like the Objectors' evidence, these data sheets also fell short of providing item information on property items; but this evidence did break down the valuation process and show its component parts and procedural steps to the greatest extent of any evidence in the case—and, considering the vast potential of any other detail for even one railroad for one year, perhaps this was the greatest extent of detail possible. Working from this detail, the witness Cohen constructed charts (Collector's Exhibit 69) showing that the railroad assessments for the six years involved here were much less than 100 per cent of full fair cash value—taking this to be an average of cost, income and market factors.

The use of the three factors, and the application of equal weight to each of them in a straight average formula, the witness Cohen called not only justifiable but essential. He further indicated that any judgment applied to the formula should be articulated in precise figures, since figures were the end result and anything not articulated in figures was likely to be arbitrary.

The witness Stiles indicated this was the approach before 1948,[18] and the witness Hulman indicated this is now more or less the approach.[19]

Another approach to railroad valuation starting from detail was a sales ratio study submitted by the witness Cohen, again utilizing official figures for all the railroad sales transactions he considered bona fide. Railroads are not frequently sold and these amounted to only ten transactions since 1948, six of these since 1957. They are shown on Collector's Exhibit 104 (Six other transactions he did not include are shown by Objectors' Exhibit 89).

The witness Cohen concluded from his valuation assessment sheets (his first approach) that while cost figures had been going up, railroad assessments had remained relatively stable for the years since World War II, particularly since 1957, and had actually declined in 1961 and 1962 (Collector's Exhibit 59).

On the second approach, the sales ratio studies, he found assessments at a weighted average of 72 per cent of market value.

Ideally, market value can be best proved by a substantial number of bona fide sales transactions. Railroads, however, are seldom sold. And when sold, they are sold not exactly in a free open market, but in the controlled circumstances of a limited monopoly supervised by government agencies, assuring a certain range of fiscal consequences. For railroads, therefore, the market figure is often taken to be the value of their stock and debt. And this figure is used as a valuation item. Another factor used is capitalized income.

Such factors are seldom if ever, used for assessing other property. Ordinary taxpayers' property may be taxed at full market value based upon cost (a sale item) though it may never have any income producing value and though

ownership equity (stock and debt) is not even ascertainable.

The result of this disparity may be that a property tax law is substantially mitigated in favor of the railroad tax payer by use of the income and market factors.

Such an analysis may not call for relationship of the income and market factors, but it does tend to warrant the ⅓ - ⅓ - ⅓ straight average as stressed by the witness, Cohen.

The Court is of the view that the Objectors' evidence of railroad property State assessed was in large part conclusions and presumptions, while the Collector's evidence was in substantial detail utilizing the pointed results from specified data, overcoming the presumption of full assessment as it was not overcome in the Kohorst case, but as that case left open the possibility of its being overcome.[20]

Burden of Proof—Extent Sustained.

The Objectors alleged for the tax years here involved that railroad (state) assessment was at 100 per cent of full fair cash value, and that local assessment was at not more than 55 per cent of full fair cash value, a disparity of at least 45 per cent, amounting to a gross discrimination or constructive fraud on the Objectors.

The Objectors had the burden of proving this allegation, either in full as to both state and local assessments, or in substantial part by showing some precise level of state assessment and some precise level of local assessment, with the state level so much above the local level as to be a gross discrimination or constructive fraud,[21] which burden must be sustained by clear and convincing proof.

The Objectors succeeded in showing local assessments at not more than 55 per cent, namely, for the 52 cases,

local assessments ranging from 48.14 per cent of full fair cash value to 51.40 per cent. (Esp. Objectors' Exhibit 15.) In other words, they sustained their burden of proof in full at local assessment.

At state railroad assessment they did not (except in six minor cases) succeed in full, but only in part, in sustaining their burden of proof. The claim of 100 per cent assessment of railroad property by the state was not proved by clear and convincing proof, or even by the greater weight of the evidence. The claim lay in the conclusions, self-serving statements, and answers given to leading questions heretofore discussed. Short of the categorical claim of 100 per cent, the Objectors showed no precise level of state assessment. The Collector did. And the Collector's figures were those supported by the credible evidence, and by the greater weight of the evidence—the only state assessment evidence on which the Court could hang its belief and reliance. (See especially Collector's Exhibit 69.)

In six minor cases, where the Collector's rebutting proof was lacking, and the Objectors could stand more securely on the presumption thus unrebutted, the Objectors sustained their burden of proving 100 per cent state assessment of railroads, and thus were entitled to relief as fully as claimed. In the other cases, the Collector's rebutting proof was entitled to the greater weight and the Objectors only partly sustained their burden, the net reliable proof showing state assessments ranging from as high as 85 per cent of full fair cash value to as low as 58 per cent. (See Schedule.) These proofs can be most conveniently shown on a table, including for each railroad tax year the precise percentage of full fair cash value addressed by local assessors against local property, the percentage assessed by state assessors against railroad property, the difference, and the percentage disparity. Such a schedule is essential as a basis for the determination of tax refunds in each case under the Hillison case.

The schedule, in table form as computed by the Court, follows:

Schedule of Assessment Levels

		a	b	c	c/a %
		Railroad (State)	Local	Difference	Disparity
C. B. & Q.	1957	75.30	48.14	27.16	36.06
	1958	71.60	51.40	20.20	28.21
	1959	72.70	49.96	22.74	31.31
	1960	73.00	49.78	23.22	31.80
	1961	77.00	50.00	27.00	35.06
	1962	76.00	50.00	26.00	34.21
C. & N.	1957				*
	1958	70.70	51.40	19.30	27.29
	1959	67.80	49.96	17.84	26.31
	1960	63.00	49.78	13.22	20.98
	1961	65.00	50.00	15.00	23.07
	1962	61.00	50.00	11.00	18.03
I. C.	1957				*
	1958				*
	1959	68.00	49.96	18.04	25.52
	1960	67.00	49.78	17.22	25.70
	1961	69.00	50.00	19.00	27.53
	1962	70.00	50.00	20.00	28.57
N. Y. C.	1957	72.00	48.14	23.86	33.13
(C. C. C. & St. L.)	1958	69.50	51.40	18.15	26.11
	1959	70.00	49.96	20.04	28.62
	1960	71.00	49.78	21.22	29.88
	1961	75.00	50.00	25.00	33.33
	1962	81.00	50.00	31.00	38.27
Pa.	1957				*
	1958				*
	1959				*
	1960				*
	1961	71.00	50.00	21.00	29.57
	1962	72.00	50.00	22.00	30.55
G. M. & O.	1957				*
	1958	67.20	51.40	15.80	23.51
	1959	72.00	49.96	22.04	30.61
	1960	72.00	49.78	22.22	30.86
	1961	74.00	50.00	24.00	32.43
	1962	74.00	50.00	24.00	32.43

* Valuation objection for this railroad for this tax year was not filed, or has been settled, or in any event is not at issue.

Schedule of Assessment Levels

		a	b	c	c/a
		Railroad (State)	Local	Difference	% Disparity
Wabash	1957				*
	1958				*
	1959				*
	1960				*
	1961	64.00	50.00	14.00	21.87
	1962	67.00	50.00	17.00	25.33
C. & E. I.	1957	60.00	48.14	11.86	19.76
	1958	58.00	51.40	6.60	11.37
	1959	62.30	49.96	12.34	19.80
	1960	60.00	49.78	10.22	17.03
	1961	61.00	50.00	11.00	18.03
	1962	64.00	50.00	14.00	21.87
N. Y. Ch. & St. L.	1957				*
	1958				*
	1959	71.00	49.96	21.04	29.63
	1960	71.00	49.78	21.22	29.88
	1961	72.00	50.00	22.00	30.55
	1962	70.00	50.00	20.00	28.57
Terminal of St. L.	1957				*
	1958				*
	1959				*
	1960				*
	1961	81.00	50.00	31.00	38.27
	1962	82.00	50.00	32.00	39.02
Ill. Term.	1957				*
	1958				*
	1959				*
	1960				*
	1961	77.00	50.00	27.00	35.06
	1962	85.00	50.00	35.00	41.17
Alt. & So.	1957				*
	1958				*
	1959				*
	1960				*
	1961	77.00	50.00	27.00	35.06
	1962	77.00	50.00	27.00	35.06

* Valuation objection for this railroad for this tax year was not filed, or has been settled, or in any event is not at issue.

Schedule of Assessment Levels

		a	b	c	c/a %
		Railroad (State)	Local	Difference	Disparity
Mo-Ill. B&B	1957	100.00	48.14	51.86	51.86
	1958	100.00	51.40	48.60	48.60
	1959	100.00	49.96	50.04	50.04
	1960	100.00	49.78	50.22	50.22
	1961	100.00	50.00	50.00	50.00
	1962	100.00	50.00	50.00	50.00

* Valuation objection for this railroad for this tax year was not filed, or has been settled, or in any event is not at issue.

The Objectors claim these determinations constitute "findings" which cannot be substituted by the Court for the administrative findings of the assessing bodies. This claim is not well taken. On the contrary, the findings made by the assessing authorities and the determinations made here by the Court are not even of the same nature. The assessing authorities of the state regarding railroads and of the local taxing authorities regarding other property made findings in dollar figures of the value of property assessed. The Court here does not even deal in dollars, but in percentages. It makes no findings at all. It determines only whether the assessing authorities were right, that is, at 100 per cent of value (as claimed locally by the Collector and as claimed statewide by the Objectors) in the findings that the assessing authorities made—and if they were not right, then to what extent they were wrong, that is, to what extent they fell short of 100 per cent. The Court determined that the findings of neither the local nor the state assessors were 100 per cent value findings, and the foregoing schedule shows the extent to which their findings as shown by the evidence fell short of being 100 per cent value findings. This kind of determination is of course the very determination the Objectors asked the Court to make. To call such a determination "findings" and thus say now that the Court could not make it is to quarrel not with the Court's authority or procedure but with the result:

Judgments in accord with these views were duly entered, utilizing the figures from the schedule of assessment levels, inserting appropriate figures in each of the 52 cases consolidated for trial. Since it could not be concluded that either side had "won"—the railroads having received very substantial but by no means total relief—the Court prepared its own judgment order. This included a provision for refund in accord with the Hillison case guide. (A copy of this judgment order is appended.) No other "conclusion" for this statement need be made.

Pursuant to Supreme Court Rule 36c this statement is included in the report of proceedings at the trial, with copies for the convenience of counsel and the Court on appeal.

James O. Monroe, Jr., /s/
Circuit Judge.

NOTES.

* Deciding this case is so largely a matter of evidence rather than law, and the principles of evidence involved are so elementary, that the customary citations of authority would unduly encumber this statement and are avoided except as noted. There is appended for the information of the Court on appeal a list of authorities briefed by the court here and studied and considered as requested by both sides.

[1] Such material may become a critical basis for decision. See the use of non-legal writing in Brown v. Board, 347 U. S. 483, 494, note 11 (1954), perhaps the most momentous case of our times.

[2] Cleary, Illinois Evidence (2nd ed.), sec. 7.6; Knight v. Collings, 227 Ill. 348, 353 (1907), action at law; Oswald v. Nehls, 233 Ill. 438, 444 (1908), suit in chancery.

[3] The position is stated at Rec. pp. 691-701, 962-965, and 973-975. The two principal cases are C. & N. W. Ry. Co. v. Dept., 6 Ill. 2d 278 (1955), and C. B. & Q. R. R. Co. v. Dept., 17 Ill. 2d 376 (1959). Peo. ex rel. Enrietta v. G. M. & O. Rd. Co., 29 Ill. 2d 605 (1963), involves the same point indirectly.

[4] Todd v. Annunzio, 410 Ill. 343, 348 (1951); Hughes v. Ill Publ. Aid. Comm., 2 Ill. 2d 374 (1954); I. L. P., Estoppel, sec. 33, esp. notes 84-90, incl.

[5] Constitution of Illinois, Art. IX, sec. 1; I. L. P., Revenue, secs. 15 et seq.

[6] Ill. Rev. Stats. 1963, secs. 501, 560, 561, 611, and 627-632 incl. (Revenue Act of 1939, secs. 20, 79, 80, 130, and 146-151 incl.).

[7] Ill. Rev. Stats. 1963, secs. 627-632 incl. (Revenue Act of 1939, secs. 146-151 incl.).

[8] See testimony of Weil, Rec. pp. 472 et seq., and of Cohen, Rec. pp. 948-958, 1508, 1509, 1515, 1530, 1567, 1568, 1573, 1638, 1650-1655, 1716.

[9] Cleary, Illinois Evidence (2nd ed.), secs. 4.11 through 4.16, esp. secs. 4.14 and 4.15; and Wigmore, Evidence (3rd ed.), secs. 2490-2493.

[10] See esp. Collector's Exhibit 69 and background exhibits.

[11] Ill. Rev. Stats. 1963, secs. 627-632, incl.

[12] Cleary, Illinois Evidence (2nd ed.), sec. 17.11.

[13] See, e. g., testimony of Koncel, Rec. pp. 2545 (volume of work), 2576-2580 (arbitrary assessment reductions), and 2619-2622 (range of variance in assessments). He said that there was no specific weight assigned to a cost indicator in applying the judgment factor (Rec. p. 2592). He said there was a "tolerance between railroad assessors in taking the same figures and arriving at a result," a tolerance of 15 per cent; and that if he brought in different assessors to do his job in 1961 and 1962 they might have reached figures that were 15 per cent different (Rec. p. 2619). This 15 per cent "could be either way . . . up or down . . . from the figure determined (by him) in 1961 and 1962" (Rec. pp. 2621, 2622).

[14] See Koncel depositions, Objectors' Exhibits 71 (Ex. pp. 10, 11), 72 (Ex. p. 16), 73 (Ex. pp. 9, 10), and 74 (Ex. pp. 8, 9, 22). See also Danis deposition, Objectors' Exhibit 76 (Ex. pp. 9, 18, 20).

[15] Reference is to Exhibit pages, not Record pages.

[16] 22 Ill. 2d 104, 109 (1961).

[17] Cleary, Illinois Evidence (2nd ed.), secs. 4.14 and 4.15.

[18] Rec. pp. 2283 et seq.

[19] Rec. pp. 1069 et seq.

[20] 22 Ill. 2d 104, 109 (1961). Peo. ex rel. Hillison v. C. B. & Q. R. R. Co., 22 Ill. 2d 88, 102 (1961), is to the same effect, decided on the basis that there was "no evidence in the record to overcome the presumption" (102), but likewise clearly implying a different result if there is such evidence.

[21] Kohorst, supra, 109.

REFERENCES. [a]

[a] Omitted here. Set forth at pp. 27-30 of People's Additional Abstract, Vol. I "Illinois Supreme Court Record", p. .....

Form of Judgment Order.

In the Circuit Court,
Third Judicial Circuit,
Madison County, Illinois.

People of the State of Illinois, ex rel. Treasurer and ex-officio Collector of Madison County, Illinois (now George Musso, heretofore James T. Callahan and Dan McGee), Applicant-Plaintiff, v. .... Objector-Defendant.	Application for Judgment for Taxes, with Tax Objections. Tax Year ..... Former County Court Case No. ..... Consolidated Herein With Other Cases

FINAL ORDER ON VALUATION OBJECTION AND CLAIM OF DISCRIMINATORY ASSESSMENT.

The Application of the People of the State of Illinois, on the relation of and through the Treasurer and Ex-Officio Collector of Madison County, Illinois, for judgment for taxes against the Objector, and the valuation objection of the Objector to its taxes and to such a judgment, having come on for hearing and having been presented, heard, and argued, and having been considered by the Court, the Court now enters its order, stating, reciting, finding or adjudging as follows:

Proceedings.

1. The Applicant for judgment and Plaintiff is the People of the State of Illinois, on the relation of and through the Treasurer and ex-officio Collector of Madison County, Illinois, who now is George Musso, and who, as his pred

cessor in office, from December 1954 to December 1958 was James T. Callahan, and from December 1958 to December 1962 was Dan McGee; and he or they may be hereinafter called the Collector, Applicant, Plaintiff or People.

2. The Objector and Defendant is .....

.....

a corporation; and it may be hereinafter called the Objector or Defendant.

3. The tax year is the Objector's tax year .....

4. The Objector has duly paid its taxes for this year, but has made such payment in part under protest, and in this regard has filed its objection, objecting to such taxes and to any judgment against it for such protested taxes, and claiming a refund of such protested taxes paid.

5. By proper proceedings duly shown of record, this case has been consolidated for hearing with other cases, involving this Objector for other tax years, and involving other Objectors for this or other tax years; and in so far as they may be applicable to this case, any or all of the things presented in any or all of the consolidated cases have been considered as applicable in and to this case.

6. In this case or in the consolidated cases, there have been:

a. Certain pleadings and papers filed by the Collector, and certain pleadings and papers filed by the Objector.

b. Judicial notice taken by the Court of the files and dockets in these cases.

c. Stipulations entered into between and among the parties, regarding proceedings, records, exhibits, and evidence, including records of the County Clerk, the County Treasurer, the Board of Review, and the Recorder of

Madison County, Illinois, the Department of Revenue of the State of Illinois, the Illinois Commerce Commission, and the Interstate Commerce Commission, made subject to consideration in this case to the extent that any party placed reliance on such records and noted such reliance for the Court's attention, and with appropriate provision for excerpting the parts thereof relied on for the record before this Court.

d. Evidence, including testimony heard in court hearings and evidence depositions duly transcribed and presented in court, together with exhibits presented in hearings or depositions and duly admitted, including record exhibits hereinabove mentioned.

e. Presentations of law, through briefs, memoranda, letters, and oral assertion.

f. Argument, duly made orally and in writing, from time to time and in conclusion.

g. Form of orders, proposed and suggested orally and in writing.

h. Computations for proposed and suggested refunds or judgments, made orally and in writing, claimed by the respective parties in substance and adaptable regarding foram in any event.

And all such matters are taken as properly before the Court, and objections to them are taken as waived, all unless and except to the extent otherwise noted.

7. The Court has jurisdiction of the subject matter and the parties, in regard to the application for judgment and to the objections and to all matters pertinent to them.

Recitals or "Findings"

8. The Collector's application for judgment was made in apt time and in proper form, and formal proof thereof

is taken as made, without objection, or with objection waived.

9. The Objector's objection to taxes and to judgment was made in apt time and in proper form, and formal proof thereof is taken as made, without objection, or with objection waived.

10. The issue here involves the Objector's objection, or that part of it, relating to the assessed valuation of the Objector's property, rather than to the legality of any tax rates, which rates to the extent of their validity may however hereafter be considered in computing any refund or judgment to be made after decision of the valuation matters at issue here.

11. The State of Illinois, through its Department of Revenue, pursuant to statute, assessed the Objector's railroad property (except non-carrier real estate, locally assessed) as a unit, state-wide, including its railroad property in Madison County, at what purported to be its fair cash value; which the Objector claims was in effect its full fair cash value (100%), and which the Collector claims was not.

12. The State of Illinois and County of Madison, through proper local assessing authorities and the Department of Revenue, pursuant to statute, assessed and through a duly determined multiplier equalized other property in Madison County at what purported to be its fair cash value; which the Collector claims was in effect its full fair cash value (100%), and which the Objector claims was not.

13. Both the Collector and the Objector presented evidence regarding the levels of assessment of railroad property state assessed and of locally assessed property, which evidence is before the Court to be considered by it, regardless of what party produced it.

14. The Objector alleges for the tax year here involved that its railroad (state) assessment was at 100 per cent of full fair cash value, and that local assessment was at not more than 55 per cent of full fair cash value, a disparity of at least 45 per cent, amounting to a gross discrimination or constructive fraud on the Objector.

15. The Objector has the burden of proving this allegation, either in full as to both state and local assessments, or in substantial part by showing some precise level of state assessment and some precise level of local assessment, with the state level so much above the local level as to be a gross discrimination or constructive fraud, which burden must be sustained by clear and convincing proof.

16, This case is here on the merits, on the issue of whether or not the Objector's burden of proof has been sustained, and if so to what extent.

17. This Court having general jurisdiction to enter judgments at law and to prevent or provide remedies against fraud, and having been asked by the Collector, through its application for judgment, and by the Objector, through its objection, to take jurisdiction of the application and objection and the issue thereunder, does take and exercise its jurisdiction to determine whether the Collector is entitled to judgment and if so for how much, and to determine whether the Objector has suffered any discrimination or fraud and if so to what extent and whether it is entitled to any refund of taxes paid and if so how much.

18. The Objector has sustained the burden of proof to the extent that there is shown in the evidence, and by the greater weight of the evidence, the following levels of assessment for the tax year mentioned:

Level of Assessment.

Objector's state-assessed railroad property, including that portion in Madison County	.....%	(a)[1]
Locally assessed property in Madison County	.....%	(b)[2]
Arithmetical Difference (a — b)	.....	(c)[3]
Percentage Disparity (c ÷ a)	.....%	

[1] See especially Collector's Folio Exhibit 60 summarized in Collector's Exhibit 69, Collector's Exhibit 104, and testimony of the witness Cohen.

[2] See especially Objector's Folio Exhibit 14 summarized in Objector's Exhibit 15, and testimony of the witness Weil.

[3] Computation of any refunds rising from this difference or disparity must be in accord with Peo. ex rel. Hillison v. C. B. & Q. R. R. Co., 22 Ill. 2d 88, 102-103. The amount of refund may vary among various taxing districts in accord with the ratio of railroad property to total property in the district. And the over-all amount of refund may of course vary from the initial arithmetical difference or percentage disparity shown above.

and this disparity was so great as to constitute a gross discrimination against the Objector; but beyond this extent and otherwise, the Objector has failed to sustain the burden of proof

19. No actual fraud on the Objector was intended by either state or local assessment authorities and none is claimed or proved; nevertheless, the foregoing disparity in assessment was so great as to be in part constructively fraudulent and to warrant in part the relief claimed by the Objector.

20. By reason of the disparity in assessments shown, and to the extent thereof, but to that extent only, the Objector has been damaged, the Objector's objections should be sustained, judgment should be denied, and the Objector should have a refund.

21. The measure of the Objector's damage and refund should be the difference between its taxes for the year

mentioned and the amount its taxes for that year would have been had all the property in the County been assessed at full cash value.*

22. The amount of any such refund should be determined only after consideration of the amount of any other refunds (including refunds for objections regarding rates) heretofore made or determined to be made, with any appropriate offset or reduction so as to preclude any double recovery; and such refund should in any case not exceed the amount of those taxes paid which were paid under protest.

23. In all other respects on this issue, and beyond the extent indicated, the Objector has not been damaged, the Objector's objections should be denied, judgment should be granted, and the Objector's taxes paid should be retained by the Collector and distributed by him to the taxing districts concerned.

Decision and Judgment.

It is therefore considered, ordered, adjudged, and decreed as follows:

I. To the extent indicated and the damage and refund due, the Objector's objections are sustained, the Collector's application for judgment is denied, and the Collector is ordered to refund to the Objector the amount due the Objector.

II. The measure of this damage and refund is the difference between the Objector's taxes for the year mentioned and the amount its taxes for that year would have been had all property in the County been assessed at full fair cash value.

III. The damage and refund due shall be determined only after consideration of the amount of any other re-

* See Hillison, 102-103.

funds (including refunds for rate objections) heretofore made or determined to be made, with any appropriate offset or reduction so as to preclude any double recovery: and such refund shall not exceed the amount of those taxes paid which were paid under protest.

IV. Beyond this extent of damage and refund indicated, and otherwise and to all other extent, the Objector's objections are overruled, the Collector's application for judgment is granted, and the Court hereby enters judgment for the Collector and against the Objector, and the Collector is ordered to retain for distribution to the taxing districts concerned the remaining balance of all such taxes extended or paid by the Objector (together with any amount to be retained by reason of offset or limitation).

V. The amount to be refunded to the Objector and the amount to be retained by the Collector and the distribution by him to the various taxing bodies or districts, shall be hereafter computed by representatives of the Collector and of the Objector, with such computation to be submitted, mutually checked, verified, and then approved by this court.

VI. The Court retains jurisdiction of this cause for the purpose of approving or correcting such computation and implementing the process of refund, retention and distribution of the tax moneys involved.

VII. The finality of this order, judgment and decree shall not be affected by any delay in the ultimate computation of the dollar amounts to be refunded, retained, or distributed.

VIII. There is no just reason for delaying the enforcement or appeal of this order, judgment and decree.

Enter this ..... day of August, 1964.

.....

Circuit Judge.

APPENDIX C.

Prototype of the Forty-Six Judgments Entered by the Supreme Court of Illinois.[a]

And now, on this day [June 24, 1965], this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered by the Court that the error and others in the record and proceedings aforesaid the judgment of the Circuit Court of Madison County in this behalf rendered, Be Reversed, Annulled, Set Aside and Wholly for Nothing Esteemed, and this cause be remanded to the Circuit Court of Madison County with directions to order a refund in conformity with the method outlined in the **Hillison** and **Kohorst** cases and subject only to the same limitations there fixed.

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[a] 11 Ill. Sup. Ct. Rec. 172-217.

APPENDIX D.

From the Illinois Revenue Act of 1939 as Amended.*

I. Statutory Duty of Director of Revenue to Equalize Local Assessments.

A. Prior to January 1, 1946.

"The Department **may** so lower or raise the total assessed value in any county as returned by the County Clerk as shall make the property in such county bear a **just relation** to the assessed value of property in other counties. . . ." Ill. Rev. Stat. 1943, Ch. 120, § 623 (emphasis added).

B. January 1, 1946-July 22, 1959.

". . . The Department **shall** lower or **raise the total assessed value of property in any county as returned by the County Clerk so that such property will be assessed at its full, fair cash value.** . . . By means of a comparison of assessed valuations as revised by boards of review or boards of appeals, as the case may be, and estimated full, fair cash values established through the analysis of property transfers, property appraisals, and such other means as it deems proper, and reasonable the Department shall annually ascertain and determine the percentage relationship for each county of the State, between the valuations at which locally assessed property is listed by assessors and revised by boards of review or boards of appeals, as

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* The statutory assessment standard in Illinois has been full (100%) value since 1927 with regard to both locally assessed and state assessed property. See People's Second Brief, pp. 1-2B, 11 Ill. Sup. Ct. Rec. 88. Statutory provisions concerning local assessors are in Ill. Rev. Stat., 1965, Ch. 120, §§ 501, 502, 483-497. § 498 explicitly divides assessment duties between local assessors and the Department of Revenue on the basis of type of property.

the case may be, and the estimated full, fair cash value of such property . . . with the ratio so ascertained . . . for each county, **the Department shall** then ascertain the amount to be added to or deducted from the aggregate reviewed assessment on property subject to local assessment jurisdiction in **order to produce a ratio of assessed to full, fair cash value equivalent to one hundred per cent.**" Ill. Rev. Stat. 1945, Ch. 120, § 627 (emphasis added).

C. **July 22, 1959-August 2, 1965.**

". . . The Department **shall** lower or raise the total assessed value of property in any county or assessment district in a county having 500,000 or more inhabitants as returned by the County Clerk so that such property will be **assessed at its full, fair cash value** in any year in which a quadrennial assessment is made in such county or in an assessment district in a county having 500,000 or more inhabitants. **The equalization factor thus determined shall be used in like manner in each of the three succeeding years.** . . ." Ill. Rev. Stat. 1961, Ch. 120, § 627 (emphasis added).

II. **Statutory Duty of Director of Revenue to Assess Railroad Property.**

Standard of Assessment.

"The Department shall assess all property **owned** or **used** by railroad companies **operating** within this State as of April first annually, except property found by the Department to be non-carrier real estate . . . The Department **shall,** in determining **the fair cash value** of the property assessed by it, **value all the property of any railroad company as a unit,** but shall make due allowance for any non-carrier real estate. For the purpose of determining the fair cash value of the property of any railroad company the Department shall take into consideration the

actual or market value of the shares of stock outstanding, the actual or market value of all bonds outstanding and all other indebtedness or shall be applicable, for operating the road, provided, in determining the market value of any such stock or indebtedness, the Department shall consider quotations for the next preceding five years; the net earnings of the company during the five calendar years preceding the assessment date; **and such other information as the Department may consider as bearing on the fair cash value of the property of a railroad company. . . .**" Ill. Rev. Stat. 1937, 1963, Ch. 120, § 563 (emphasis added).

Property to Be Assessed.

"The term 'operating property' shall mean and include all tracks right of way, all structures and improvements on such right of way, all rights and franchises, all rolling stock and car equipment, and all other property, real or personal, tangible or intangible connected with or used in the operation of the railroad including real estate contiguous to railroad right of way or station grounds held for reasonable expansion or future development." Ill. Rev. Stat., 1937-1963, Ch. 120, § 560.

Legislative Direction on Cost Data.

"Each year every railroad company in this State shall return to the Department, in addition to any other information required by this Act, sworn statements or schedules as follows: . . . (8) The reproduction cost of the property within Illinois and the total reproduction cost of all property of such company. Said reproduction cost, so far as applicable, shall be last determined by the United States Interstate Commerce Commission, or other competent authority, plus additions and betterments and depreciation to the December 31, next preceding the assessment." Ill. Rev. Stat., 1937-1963, Ch. 120, § 563.

Interstate Allocation.

"If any railroad company owns or uses operating property partly within and partly without this State, the commission **shall determine the value of the entire operating property of such railroad** but shall take only that part of such entire value as is represented by the average percentage of (a) the length of all track including main, second and additional main track, side track and turnouts within this State, (b) its gross revenues arising from railroad operations in this State, (c) the reproduction cost of its operating property within this State, as determined by the Interstate Commerce Commission of the United States, or other competent authority, plus additions and betterments, less retirements and depreciation. Provided nothing in this section shall be construed to preclude the use or substitution of such other factors or methods as may appear reasonable and necessary in determining for any railroad the proportion of its operating property or any part thereof within this State. Ill. Rev. Stat., 1937-1963, Ch. 120, § 565.

Distribution of Railroad Assessments (1937-1963).

"The full fair cash value of the operating property and non-operating personalty of every railroad company subject to assessment shall be listed and taxed in the several taxing districts in the proportion that the length of all the track owned or used in such taxing district bears to the whole length of all the track owned or used in this state, except the value of all station houses, depots, machine shops or other buildings of an original cost exceed $1,000 which shall be deemed to have a situs in the taxing district in which the same are located. **The Department shall equalize** and distribute **the full, fair cash value of the property of every railroad company** (other than non-carrier real estate) to the respective taxing districts entitled thereto and shall certify the same to the county

clerks of the respective counties who shall extend taxes against such values the same as against other property in such taxing districts. Ill. Rev. Stat., 1937-1963, Ch. 120, § 567 (emphasis added).

1963 Equalization Amendment (1963).

". . . The Department shall determine the equalized assessed value of the property of every railroad company, other than non-carrier real estate, by applying to its determination of the fair cash value of such property of every railroad company an equalization factor which factor shall be the statewide average ratio of the equalized assessed value of locally assessed property to the full, fair cash value of such locally assessed property." Ill. Rev. Stat., 1965, Ch. 120, § 561 (August 26, 1963).

"The equalized assessed value of the operating property . . . when determined as prescribed in Section 80 of this Act shall be listed and taxed in the several taxing districts. . . ." Ill. Rev. Stat., 1965, Ch. 120, § 567.

APPENDIX E.

Data Proving the Trial Court's Interpretation of "Judgment Factor" Reductions as an Arbitrary Technique to Eliminate Inflation From State Assessments of Railroad Property in Illinois, 1946-1962.

	1946[a]	1947	1948[b]	1949[c]	1950[d]	1951	1952	1953	1954	1955	1956	1957	1958	1959[e]	1960[f]	1961[g]	1962[h]
Total Assessment by Director of Revenue of Railroad Property	1,083,746,500	1,077,466,000	1,078,971,000	1,084,196,000	1,075,583,000	1,084,964,000	1,088,193,000	1,096,730,000	1,090,815,000	1,095,390,000	1,098,034,000	1,107,298,000	1,090,335,000	1,055,262,000	1,052,378,000	1,000,305,000	998,388,000
Chicago, Burlington and Quincy[i]																	
Capitalized Income[j]						152,112,000	155,355,000	153,242,000	149,811,000	154,871,000	150,943,000	151,728,000	142,332,000	130,138,000	121,803,000	109,585,000	100,595,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					112,475,000	114,932,000	116,242,000	120,167,000	121,844,000	128,912,000	135,519,000	139,027,000	133,578,000	132,428,000	127,424,000	122,973,000
RCNLD Adjusted[j]						219,060,000	243,517,000	248,603,000	245,050,000	276,975,000	280,480,000	298,303,000	334,100,000	328,093,000	334,150,000	311,900,000	315,165,000
Formulaic Average						161,212,000	171,370,000	172,697,000	171,676,000	184,563,000	186,778,000	195,183,000	205,153,000	197,270,000	192,794,000	182,936,000	179,911,000
Less "Judgment Factor"[k]						20,157,000	30,130,000	29,547,000	28,476,000	41,377,000	42,178,000	47,983,000	58,153,000	53,770,000	51,794,000	42,486,000	41,961,000
ASSESSMENT	133,900,000	133,900,000	140,000,000	141,000,000	140,000,000	142,809,000*	143,500,000*	144,600,000*	144,600,000*	144,600,000*	144,600,000*	147,000,000*	147,000,000	143,500,000	141,000,000	140,450,000	137,950,000
Chicago & Northwestern[l]																	
Capitalized Income[j]						39,568,000	35,732,000	36,194,000	34,827,000	33,322,000	32,119,000	21,727,000	22,250,000	23,719,000	25,234,000	23,290,000	21,486,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					41,289,000	41,655,000	43,996,000	49,198,000	52,722,000	56,132,000	65,546,000	68,178,000	73,232,000	73,256,000	63,494,000	63,215,000
RCNLD Adjusted[j]						192,820,000	200,545,000	213,000,000	193,083,000	205,720,000	200,882,000	215,922,000	236,145,000	235,984,000	247,975,000	259,292,000	249,956,000
Formulaic Average						91,225,000	92,644,000	97,730,000	92,370,000	97,255,000	96,378,000	101,065,000	108,847,000	110,642,000	115,850,000	115,592,000	114,786,000
Less "Judgment Factor"[k]						2,225,000	4,894,000	10,980,000	7,870,000	15,805,000	15,408,000	24,565,000	31,847,000	35,642,000	42,850,000	49,092,000	43,786,000
ASSESSMENT	90,000,000	90,000,000	95,000,000	95,000,000	90,250,000	89,000,000	87,750,000	86,750,000[m]	84,500,000	81,450,000	80,970,000	76,500,000	77,000,000	75,000,000	73,000,000	73,500,000	71,000,000
Illinois Central (non-charter property)																	
Capitalized Income[j]						93,529,000	99,198,000	104,161,000	105,046,000	107,571,000	102,941,000	100,091,000	91,842,000	84,892,000	79,110,000	66,375,000	58,927,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					62,342,000	62,462,000	66,303,000	67,414,000	71,606,000	72,236,000	73,640,000	71,600,000	69,045,000	66,320,000	59,568,000	54,609,000
RCNLD Adjusted[j]						98,341,000	107,259,000	127,504,000	130,895,000	141,322,000	143,898,000	149,744,000	162,030,000	163,640,000	171,895,000	180,687,000	177,509,000
Formulaic Average						84,404,000	89,640,000	99,323,000	101,118,000	107,007,000	106,358,000	107,825,000	108,490,000	107,535,000	105,775,000	102,310,000	97,015,000
Less "Judgment Factor"[k]						12,504,000	17,140,000	25,823,000	26,918,000	32,207,000	31,358,000	32,325,000	33,790,000	34,325,000	34,525,000	31,460,000	28,990,000
ASSESSMENT	70,000,000	69,000,000	70,500,000	70,500,000	70,500,000	71,200,000*	72,500,000*	73,500,000*	74,200,000*	74,800,000*	75,000,000*	75,000,000*	74,700,000*	73,000,000*	71,350,000*	70,750,000	68,025,000
New York Central																	
Capitalized Income[j]						29,582,000	36,142,000	41,132,000	45,551,000	47,245,000	54,076,000	54,166,000	50,217,000	40,840,000	38,727,000	37,832,000	17,479,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					39,600,000	41,168,000	43,996,000	47,197,000	50,932,000	53,607,000	51,393,000	50,600,000	48,240,000	46,971,000	41,690,000	38,072,000
RCNLD Adjusted[j]						120,418,000	129,480,000	131,721,000	136,960,000	166,503,000	156,537,000	154,790,000	161,575,000	156,370,000	149,922,000	151,287,000	144,597,000
Formulaic Average						64,723,000	69,910,000	72,283,000	76,569,000	88,227,000	88,073,000	86,783,000	87,464,000	81,817,000	78,540,000	73,603,000	66,716,000
Less "Judgment Factor"[k]						1,723,000	7,535,000	9,658,000	14,569,000	26,992,000	25,848,000	21,258,000	26,689,000	24,452,000	23,040,000	18,353,000	12,516,000
ASSESSMENT	64,500,000	64,000,000	63,000,000	63,000,000	63,000,000	63,000,000	62,325,000	62,625,000	62,000,000	62,225,000	62,225,000	62,525,000	60,750,000	57,365,000	55,500,000	55,350,000	54,200,000
Pennsylvania																	
Capitalized Income[j]						28,478,000	31,559,000	37,003,000	36,547,000	36,876,000	37,848,000	41,400,000	38,367,000	30,836,000	28,632,000	20,498,000	14,034,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					40,033,000	39,545,000	40,850,000	39,753,000	41,023,000	40,850,000	42,480,000	42,254,000	40,583,000	38,964,000	36,713,000	35,095,000
RCNLD Adjusted[j]						100,587,000	110,894,000	116,257,000	115,540,000	123,812,000	123,640,000	134,700,000	142,782,000	139,728,000	141,725,000	149,004,000	149,870,000
Formulaic Average						56,630,000	60,970,000	65,045,000	64,600,000	67,237,000	67,446,000	72,860,000	74,468,000	70,382,000	69,774,000	68,738,000	66,330,000
Less "Judgment Factor"[k]						3,370,000	7,720,000	11,545,000	11,635,000	13,937,000	14,146,000	19,110,000	21,518,000	20,382,000	20,974,000	20,188,000	18,730,000
ASSESSMENT	66,860,000	65,304,000	60,231,000	58,000,000	55,000,000	53,250,000	53,250,000	53,500,000	52,965,000	53,300,000	53,300,000	53,750,000	52,950,000	50,000,000	48,800,000	48,550,000	47,600,000
Gulf, Mobile & Ohio																	
Capitalized Income[j]						57,182,000	57,790,000	61,537,000	62,494,000	64,174,000	64,499,000	62,267,000	53,003,000	45,701,000	41,650,000	34,765,000	31,397,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					45,011,000	45,359,000	47,203,000	47,959,000	49,343,000	51,816,000	52,180,000	48,615,000	44,749,000	42,860,000	39,773,000	36,700,000
RCNLD Adjusted[j]						62,408,000	64,596,000	105,675,000	101,140,000	106,235,000	107,350,000	116,350,000	126,115,000	117,916,000	119,660,000	119,801,000	115,946,000
Formulaic Average						54,867,000	55,915,000	71,472,000	70,531,000	73,250,000	74,555,000	76,932,000	75,910,000	69,455,000	68,057,000	64,780,000	61,348,000
Less "Judgment Factor"[k]						8,867,000	9,015,000	22,077,000	20,536,000	22,255,000	23,305,000	25,232,000	24,915,000	19,755,000	19,307,000	16,530,000	15,598,000
ASSESSMENT	7,900,000	8,000,000 (Alton RR. acquired)	44,000,000	46,000,000	49,500,000	46,000,000*	46,900,000*	49,395,000*	49,995,000*	50,995,000*	51,250,000*	51,700,000*	50,995,000*	49,700,000	48,750,000	48,250,000	45,750,000
Wabash																	
Capitalized Income[j]						53,793,000	56,412,000	60,771,000	59,586,000	64,378,000	70,742,000	73,583,000	71,858,000	64,945,000	58,355,000	45,416,000	26,647,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					31,989,000	32,341,000	36,319,000	38,518,000	42,051,000	43,755,000	44,957,000	45,721,000	46,265,000	46,075,000	45,926,000	47,453,000
RCNLD Adjusted[j]						66,297,000	74,065,000	85,106,000	83,060,000	88,855,000	88,300,000	97,722,000	101,700,000	104,270,000	103,970,000	105,123,000	102,266,000
Formulaic Average						50,693,000	54,273,000	60,732,000	60,388,000	65,095,000	67,599,000	72,088,000	73,093,000	71,827,000	69,467,000	65,488,000	58,789,000
Less "Judgment Factor"[k]						8,943,000	12,273,000	17,732,000	16,388,000	21,095,000	22,819,000	26,088,000	27,393,000	27,377,000	26,267,000	23,578,000	19,289,000
ASSESSMENT	40,911,370	41,871,000	42,892,000	42,497,215	41,953,215	41,750,000*	43,183,320*	44,419,370*	43,500,000*	44,000,000	44,750,000*	46,000,000*	45,700,000*	44,450,000*	43,200,000*	41,910,000*	39,500,000
New York, Chicago, St. Louis (Nickel Plate)																	
Capitalized Income[j]						40,760,000	44,619,000	46,715,000	45,256,000	45,902,000	43,704,000	43,324,000	42,870,000	41,515,000	41,162,000	38,807,000	35,516,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					33,882,000	33,967,000	33,547,000	33,576,000	33,962,000	33,787,000	34,035,000	34,217,000	34,725,000	34,534,000	35,289,000	36,462,000
RCNLD Adjusted[j]						33,630,000	35,593,000	38,268,000	39,763,000	43,868,000	45,113,000	49,350,000	54,400,000	51,860,000	52,998,000	52,614,000	57,089,000
Formulaic Average						36,064,000	38,170,000	39,517,000	39,532,000	41,244,000	40,863,000	42,256,000	43,329,000	42,700,000	42,998,000	42,236,000	43,022,000
Less "Judgment Factor"[k]						6,305,000	8,170,000	9,217,000	9,032,000	10,494,000	10,118,000	10,956,000	12,829,000	12,325,000	12,623,000	11,986,000	12,772,000
ASSESSMENT	29,800,000	29,000,000	26,000,000	27,500,000	27,500,000	29,750,000*	30,000,000*	30,300,000*	30,500,000*	30,750,000*	30,750,000*	31,300,000*	31,000,000*	30,375,000*	30,375,000*	30,250,000*	30,250,000
Chicago & Eastern Illinois																	
Capitalized Income[j]																	

ASSESSMENT	26,000,000	26,000,000	26,000,000	27,500,000	27,500,000	29,750,000*	30,000,000*	30,300,000*	30,500,000*	30,750,000*	30,750,000*	31,300,000*	31,000,000*	30,375,000*	30,375,000*	
Chicago & Eastern Illinois																
Capitalized Income[l]						18,903,000	25,539,000	32,794,000	36,801,000	41,856,000	43,282,000	45,440,000	44,945,000	39,107,000	39,896,000	36,959,000	33,801,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					20,491,000	22,962,000	27,614,000	30,961,000	34,353,000	37,998,000	38,322,000	38,317,000	35,628,000	37,649,000	36,963,000	34,923,000
RCNLD Adjusted[l]						53,078,000	53,125,000	64,557,000	64,203,000	70,947,000	71,703,000	77,655,000	83,700,000	77,800,000	81,553,000	87,292,000	87,532,000
Formulaic Average						30,824,000	33,513,000	41,655,000	43,988,000	49,052,000	51,026,000	53,805,000	55,854,000	50,845,000	52,773,000	51,935,000	48,179,000
Less "Judgment Factor"[k]						4,824,000	6,942,000	13,725,000	15,558,000	19,052,000	20,626,000	21,555,000	23,404,000	19,170,000	21,098,000	20,380,000	17,179,000
ASSESSMENT	25,000,000	25,000,000	25,000,000	25,000,000	25,000,000	26,000,000	26,600,000	27,930,000*	28,340,000*	30,000,000*	30,400,000*	32,250,000*	32,200,000*	31,675,000*	31,675,000*	31,555,000*	31,000,000
Illinois Terminal																
Capitalized Income[l]						21,140,000	21,194,000	18,927,000	16,818,000	15,607,000	13,681,000	18,237,000	17,749,000	13,419,000	10,294,000	10,267,000	9,273,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					18,758,000	18,910,000	18,812,000	18,417,000	18,834,000	19,258,000	16,100,000	15,270,000	11,357,000	9,735,000	9,764,000	9,264,000
RCNLD Adjusted[l]						29,300,000	29,240,000	30,145,000	33,368,000	29,870,000	26,442,000	27,260,000	29,990,000	29,570,000	28,675,000	27,023,000	23,283,000
Formulaic Average						23,066,000	23,115,000	22,628,000	22,868,000	21,437,000	19,860,000	20,532,000	21,003,000	17,745,000	16,490,000	15,915,000	13,769,000
Less "Judgment Factor"[k]						2,266,000	2,515,000	2,728,000	3,668,000	2,937,000	2,360,000	3,032,000	4,003,000	4,245,000	4,150,000	3,665,000	2,069,000
ASSESSMENT	21,300,000	21,300,000	21,250,000	21,250,000	21,000,000	20,800,000	20,600,000	19,900,000	19,200,000	18,500,000	17,500,000	17,500,000	17,000,000	13,500,000	12,250,000	12,250,000	11,700,000
Terminal Railroad Association of St. Louis																
Capitalized Income[l]						18,285,000	18,613,000	20,238,000	19,836,000	19,532,000	19,902,000	19,750,000	19,435,000	18,744,000	18,530,000	16,450,000	15,120,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					23,718,000	23,709,000	24,700,000	24,178,000	23,519,000	22,929,000	17,435,000	16,720,000	17,001,000	16,380,000	14,665,000	13,728,000
RCNLD Adjusted[l]						20,725,000	23,132,000	26,494,000	26,323,000	29,537,000	30,035,000	31,845,000	34,784,000	35,093,000	33,460,000	31,392,000	31,824,000
Formulaic Average						20,910,000	21,818,000	23,810,000	23,445,000	24,196,000	24,290,000	23,010,000	23,646,000	23,613,000	22,790,000	21,618,000	20,124,000
Less "Judgment Factor"[k]						910,000	2,068,000	4,110,000	3,745,000	4,496,000	4,590,000	3,360,000	4,396,000	5,838,000	5,696,000	4,618,000	3,432,000
ASSESSMENT	20,823,000	20,500,000	20,400,000	20,200,000	20,000,000	20,000,000*	19,750,000*	19,700,000*	19,700,000*	19,700,000*	19,700,000*	19,650,000*	19,250,000	17,775,000*	17,065,000*	17,000,000	16,800,000
Alton & Southern																
Capitalized Income[l]						12,472,000	12,770,000	12,972,000	13,618,000	14,310,000	15,185,000	15,798,000	15,782,000	14,767,000	14,655,000	13,280,000	12,078,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					10,204,000	10,448,000	.....	8,447,000	8,645,000	9,075,000	13,947,000	13,577,000	13,293,000	12,935,000	11,860,000	11,264,000
RCNLD Adjusted[l]						6,175,000	6,507,000	6,797,000	6,670,000	7,219,000	7,193,000	7,575,000	8,190,000	8,670,000	9,027,000	9,442,000	9,592,000
Formulaic Average						9,617,000	9,908,000	9,885,000	9,578,000	10,058,000	10,485,000	12,440,000	12,516,000	12,276,000	12,206,000	11,567,000	11,511,000
Less "Judgment Factor"[k]						367,000	458,000	485,000	578,000	858,000	1,285,000	3,140,000	3,216,000	3,126,000	3,206,000	2,605,000	2,611,000
ASSESSMENT	6,500,000	6,600,000	6,900,000	8,300,000	8,800,000	9,250,000*	9,450,000*	9,400,000*	9,200,000*	9,200,000*	9,200,000*	9,300,000*	9,300,000*	9,150,000*	9,000,000*	8,963,000*	8,900,000*

NOTES

[a] On Jan. 1, 1946 Illinois' centralized Full Value Equalization Program went into effect. The railroads' assessments were distributed by the Director to the counties at value and the explicit equalization of railroad assessments down to the statewide level of assessments of locally assessed real estate affected by the Directors in prior years ended. See generally economist Lynn A. Stiles' "'Full Fair Cash Value' in the 1945 Illinois Assessment Equalization Program," 22 Bulletin of National Tax Association 34 (1946); Note, "Equalization of Railroad Assessments in Illinois," 35 Ill. Law Rev. 766 (1941). Also in 1946 inflation started, to continue unto this day. The price level began to shoot upwards and the inflating prices were reflected in the Director's staff's sales'-ratio studies of locally assessed property which were based on current sales prices related to corresponding assessments, and used in the formulation by the Director of equalization multipliers for the counties. The inflating prices were also reflected in the reproduction cost of railroad property as recorded by ICC's Bureau of Valuation and transmitted to the Director's Staff for use in the administrative formula for valuing railroad operating property. The ICC's staff's "Elements of Value" are in the Record as Peo. Ex. 72. The formula averaged three elements of value.

[b] In 1948 it was estimated by Director or his staff or both that the 1946 state-wide level of assessment of locally assessed real estate after application of the Director's multipliers was "around 75%" based on 1946 selling prices captured in the sales ratio studies. Lynn A. Stiles, the Director's "Railroad Assessor" as well as expert on locally assessed property, suggested an explicit 25% reduction of railroad assessments "so that they would stand in the same relationship to today's prices as do equalized assessments on real estate."

[c] Lynn A. Stiles, the Director's "Railroad Assessor," sent a January 26, 1949 memorandum on present railroad valuation and assessment procedures to an incoming Director. The memorandum described the valuation formula developed and refined after 1933 by economists Simeon Leland, George W. Mitchell and Stiles and does not mention the use of a "judgment factor" reduction and indicates that except in special situations the formulaic average essentially constitutes value. Peo. Ex. 113. Stiles confirmed the 1948 staff suggestion to reduce railroad assessments by 25% and reported "it suffices that no explicit adjustment was made in an effort to align railroad values with others." (emphasis not added.) Later in 1949 Stiles resigned from the Department of Revenue but before his departure he delivered "Railroad Assessment and Allocations," a paper in which he stated that and explained why the three elements of value used in the Illinois formula should be given equal weight. 1949 Proceedings of National Tax Association 418. The Director replaced Stiles as "railroad assessor" by a land appraiser, Raymond S. Danis, a long time staff member of the Property Tax Division of the Department and the predecessor Tax Commission who was made directly accountable to the Director and removed from the supervision of R. L. Maynard, Supervisor of the Chicago office of the Property Tax Division.

[d] In 1950 the state-wide equalized level of real estate assessment had receded to approximately 62% according to Railroad Witness Weil, an economist and former member of the Director's staff. See Weil, "Property Tax Equalization in Illinois," National Tax Journal 157 (June, 1953) (Peo. Ex. 67), who stated that the Director had been discounting inflated prices by "judgment reductions" in formulating equalization multipliers for the counties. In 1951 the level of assessment was about 70% according to Report No. 7 of the Illinois School Problems Commission 64 (1963).

[e] In 1950 the legislature freed the multipliers certified by the Director to the counties so that the certifications need be effected generally only once every four years instead of annually. State-wide level of assessment of locally assessed property has slipped to about 50% based upon sales data of real estate. Director reduced railroad assessments.

[f] In 1959 Raymond S. Danis retired. Railroad assessments were again decreased. Danis was replaced by Edward Koncel, retired tax representative of the Chicago & Eastern Illinois Railroad. In 1961 Koncel delivered a speech in Montreal saying the three elements of value should be given equal weight except in extraordinary situations. Rr. Ex. 106.

[g] Assessments admittedly arbitrarily formulated on predetermined industry basis by Assistant Director to "hold the line" with "judgment factors" adjusted to reach individual assessments. Railroad assessments were reduced. In July 1963 the legislature required explicit equalization of railroad assessments and later in 1963 the Director eliminated the "judgment factor" reductions and valued railroad property according to formulaic averages, producing an industry valuation of $1,377,000,000, and then applied an explicit equalization factor to reach assessments. Raymond Danis died.

[h] The CB&Q and the eleven other Appellees have accounted for about 60% of the total railroad state assessment in Illinois since about 1946.

[i] The Department used as the income base for all railroads "Net Railway Operating Income," an ICC accounting concept (after taxes), without needed accounting adjustments. Inherent defects in this element as a reflector of value include peculiarities of railroad accounting and managerial prerogative. Five year average used. 6% capitalization rate. Also, five year average of stock and debt values used. There are also defects in this element as a reflection of value. System figures derived and allocated into Illinois.

[j] System reproduction cost new as determined by the Bureau of Valuation of ICC and allocated into Illinois by Director's staff. ICC RCN based on period prices. RCN was sometimes reduced by Director's staff by applying a condition percentage lower than the ICC staff found, producing a lower RCN less depreciation and obsolescence than found by ICC staff. After 1952, Illinois allocation further reduced by Director's staff for "uneconomic property" in Illinois. After 1957, further sometimes reduced by Directors' staff by arbitrary 10% of adjusted "Road and General Expenditure" RCN. (more than 60% of RCN). The limited size of the staff is described in the Record.

[k] There is no data or rational evidence in the Record or elsewhere to support this item. The percentage relationship of the reductions to formulaic averages are on Peo. Ex. 31. "Judgment factors" were employed for practically all Illinois railroads.

[l] Minute analysis of this company is contained in Appendix F to People's Second Brief II Ill. Sup. Ct. Rec. 88.

[m] Held by the Supreme Court of Illinois not to exceed value. C&NW v. Department of Revenue, 8 Ill. 2d 278 (1956). The record in that case contained precise mathematical proof that the "judgment factor" reduction was enlarged in a precise amount to carry over the prior year's assessment and reduce the prior year's assessment by $1,000,000 even though the formulaic average increased $5,086,000. However, the "judgment factor" was not in issue. The Court questioned it and confirmed that the Record did not include an explanation.

[n] Madison County's largest railroad taxpayer owned by 15 railroads including seven of the Appellees.

[o] Assessment less than average of capitalized income and securities elements of value. In the case of the CB&Q, less than capitalized income. (CB&Q's common stock was mostly owned by Northern Pacific and Great Northern).

(This data permits precise proof that the "judgment factor" was a technique by which the influence of inflation in formulaic averages was suppressed and prior year's assessments were generally either held steady or decreased to implement a policy of holding the line or reduce assessments to stabilize or decrease discrimination. The key working tools are the Rules of 1 for 3 and 3 for 1: an increase of 3 in an element of value equals an increase of 1 in the average. A reduction of the average by 1 via the "judgment factor" equals a reduction of 3 from an element of value.)

APPENDIX F.

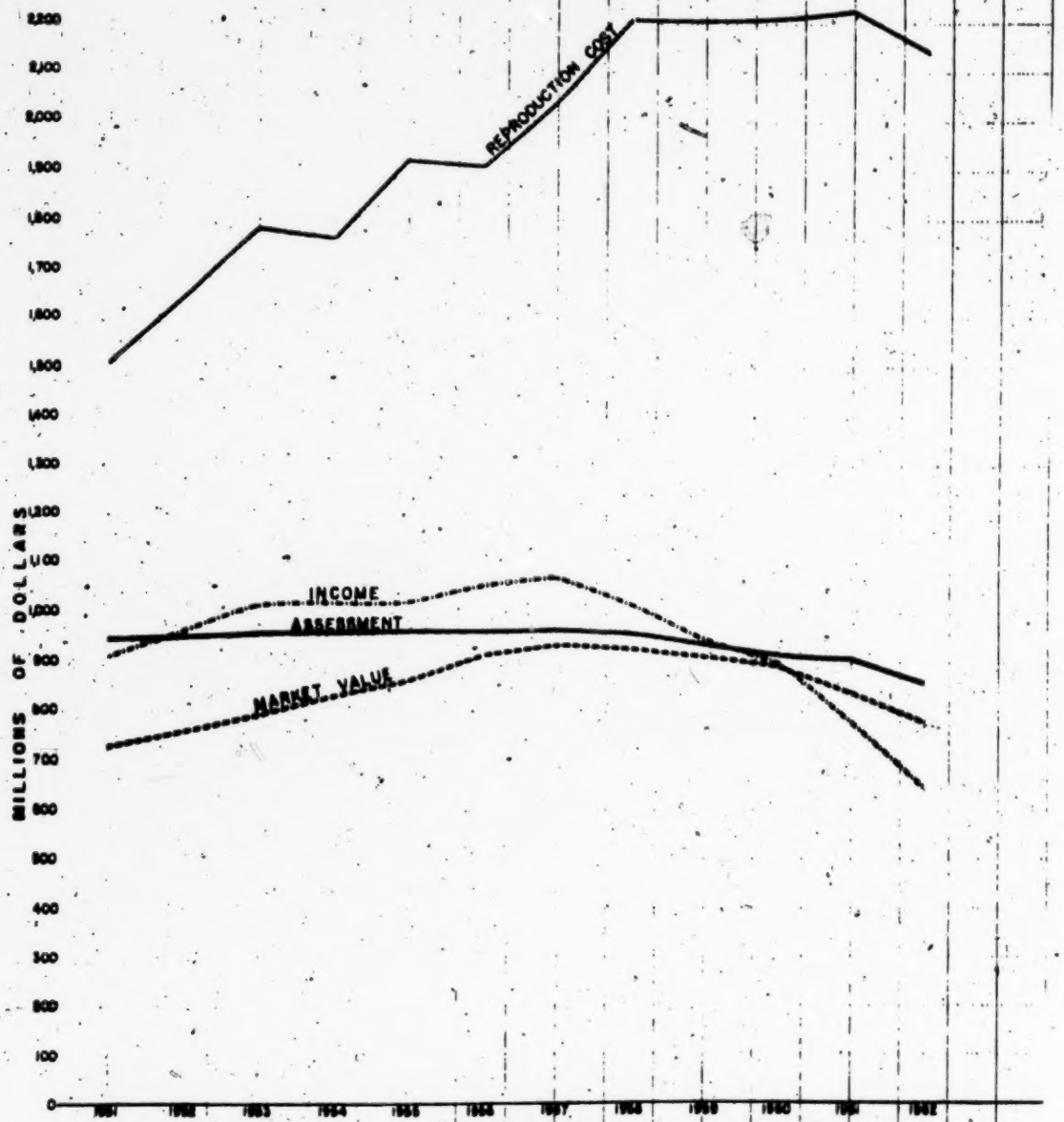
["Holding the Line"]

OBJECTORS' EXHIBIT NO. 86

Graph showing aggregate of each of the three valuation indicators and assessments for all railroads assessed on the basis of the three factor formula in Illinois for the period 1951 - 1962, incl.

GRAPH SHOWING 3 VALUATION INDICATORS AND ASSESSMENT FOR PERIOD 1951—1962 *

(SOURCE: DEPARTMENT OF REVENUE, STATE OF ILLINOIS, RAILROAD ASSESSMENT DATA SHEETS FOR PERIOD 1951—1962)



* INCLUDES FIGURES FOR ALL ILLINOIS RAILROADS COVERED BY COLLECTOR'S EXHIBIT "4" EXCEPT: AURORA, ELGIN & FOX RIVER, CHICAGO & CALUMET RIVER, CHICAGO & WESTERN INDIANA, CHICAGO, PEORIA & WESTERN, CHICAGO UNION STATION CO., COLUMBIA & MILLSTADT, DAVENPORT, ROCK ISLAND & NORTHWESTERN, DU PUE & NORTHERN, JERSEYVILLE & EASTERN, JOLIET UNION DEPOT CO., LEE COUNTY CENTRAL, MANUFACTURER'S RAILWAY OF ST. LOUIS, MISSOURI BRIDGE & BELT, PADUCAH & ILLINOIS, PEORIA TERMINAL, SOUTHERN ILLINOIS & MISSOURI BRIDGE COMPANY.

APPENDIX G.

(Entered February 1, 1966.)

In the District Court of the United States
For the Middle District of Tennessee,
Nashville Division.

Louisville and Nashville Railroad Company,
v.
Public Service Commission of Tennessee; State Board of Equalization of Tennessee, et al.
Docket No. 4310.

Opinion.

This action presents the question whether a federal court may intervene to grant injunctive relief to a taxpayer whose property, in violation of state law, has been substantially over-assessed in relation to other taxpayers in the state. Since tax laws are ancient and unrelenting, they have spawned much litigation, and the Court is not without some guidelines in the decision of the present controversy.

Jurisdiction is invoked on the grounds of (1) Federal question jurisdiction (commerce clause and Fourteenth Amendment), and (2) diversity jurisdiction. The first is denied by the defendants, and the second is admitted. Because the Court has concluded that jurisdiction exists under the equal protection clause, it is not necessary to determine whether or not relief could be granted if diversity were the sole basis of jurisdiction . . . The Court notes, however that such relief might well be barred by the holding in Erie R. Co. v. Tompkins, 304 U. S. 64 (1938), and subsequent cases.

In Angel v. Bullington, 330 U. S. 183 (1947), for example, the Court stated that:

> The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. . . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.
>
> Cases like . . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie Railroad v. Tompkins, 304 U. S. 64. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts (pp. 191-192).

See also, Ragan v. Merchants Transfer Co., 337 U. S. 530, 532 (1949) ("if recovery could not be had in the state court, it should be denied in the federal court.") And see, Guaranty Trust Co. v. York, 326 U. S. 99 (1945); Allstate Insurance Company v. Charneski, 286 F. 2d 238, (7th Cir., 1960); Berger v. State Farm Mutual Automobile Co., 291 F. 2d 666 (10th Cir., 1961); and Arrowsmith v. United Press International, 320 F. 2d 219 (2d Cir., 1963). Cf., Byrd v. Blue Ridge Cooperative, 356 U. S. 525 (1958); and Hanna v. Plumer, 380 U. S. 460 (1965).

It is admitted that if the plaintiff brought suit in a Tennessee state court, relief would be barred by the Ten-

nessee rule that a taxpayer cannot sue to have his own taxes reduced; he may sue only to have the taxes of his neighbors increased, and then, only if he can first show that his property is assessed in excess of actual cash value. See, e. g., Carroll v. Alsup, 107 Tenn. 257, 284, 64 S. W. 193, 200 (1901); McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S. W. 2d 196 (1948); Mayor and Aldermen of the Town of Morristown v. Burke, 207 Tenn. 180, 338 S. W. 2d 593 (1960); and Biltmore Hotel Court v. City of Berry Hill, ... Tenn. ..., 390 S. W. 2d 223 (1965). A citizen of Tennessee, then, could not win this action in a state court under existing state law, and he could not, because of lack of diversity, bring the action in a federal court. No sufficient reason appears why a non-citizen of this state should be able to invoke diversity jurisdiction in a federal court to reach a result on a state question which state citizens could not reach.

In Tennessee, all railroad and utility property is assessed by the Public Service Commission. All other property is assessed by county assessors and local officials. Both the Commission and county assessors are required by state law to assess all property within their respective jurisdictions at its actual cash value (See Appendices "A" and "B"). The assessment roles of all property assessed by county assessors are brought before the respective county boards of equalization, whose duty it is to equalize the assessment of all property within the county by assessing all property at its actual cash value (See Appendix "B"). The equalized assessments of the county boards, and the assessments of the Public Service Commission, are reviewed by the State Board of Equalization, whose duty it is to equalize the various county board assessments and the Public Service Commission assessments upon the basis, for all property, of actual cash value (See Appendix "B"). The State Board of Equalization then certifies back to each county the final

equalized assessment of the properties assessed by that county, and to the Public Service Commission the final equalized assessment of the properties assessed by the Commission. The latter certification was made with respect to plaintiff's property on November 23, 1965. Because of the pendency of this action and the issuance of a temporary restraining order, the Public Service Commission has yet certified to the various counties and municipalities in which the plaintiff's property is located, the final assessed value of plaintiff's property. Following certification to the counties and municipalities, the taxes based upon the certified assessments will become due and payable.

The plaintiff in this civil action seeks to restrain the Public Service Commission from certifying assessments for the years 1965-66 on all of the property of the plaintiff located in the state. It alleges that if the certification is not enjoined, the plaintiff will have to pay taxes to 54 counties and to at least 104 municipalities and will be without an adequate remedy under state law to obtain relief from what it claims is an illegal assessment of its property.

Plaintiff alleges that property assessed by the Public Service Commission is assessed at actual cash value, and that property assessed by county assessors is assessed at a state-wide average of 30% of actual cash value, with assessments ranging from a low of 7% to a high of 50%. It is alleged that this practice is systematic and intentional, and of long-standing. The defendants admit that property assessments are not uniform throughout the state, that assessments have been at less than 100% of actual cash value, and that "railroad and utility properties, being centrally assessed by the Public Service Commission, are generally assessed at a level considerably higher than the level at which locally assessed properties

are assessed." The defendants, however, would hold the plaintiff to strict proof both of the exact percentage of the plaintiff's assessment, and the exact percentage at which local properties are assessed. Nevertheless, even by the defendants' own admission, the plaintiff's property is assessed at not less than 55 or 65% of its actual cash value; and the evidence before the Court clearly demonstrates that all other properties are assessed at a statewide average of not more than 30% of their actual cash value (See Appendix "C.").

Defendants concede that the Public Service Commission is required by law to assess plaintiff's property at its actual cash value. They contend, however, that the Commission disregarded state law and assessed plaintiff's property at only 60 to 70% of actual cash value. Since the State Board of Equalization reduced the Commission's assessment by approximately 5%, defendants claim that plaintiff's final, equalized assessment is only 55 to 65% of actual cash value. This claim is based upon the fact that the Commission's assessment calculations included a "judgment factor." Defendants claim that this judgment factor was applied after the Commission had first determined actual cash value. Plaintiff claims that the judgment factor was applied in order to determine the actual cash value. The transcript of the hearing before the State Board would seem to support plaintiff's position. At the hearing, the following exchange took place:

> **Mr. Clyde W. Key: May I ask Dr. White a couple of questions? [Dr. White is the tax and rate consultant to the Public Service Commission.]**
>
> **The Chairman: Yes, sir.**
>
> **Mr. Key: Dr. White, your ultimate goal is to reach actual cash market value after application of your seventy-percent factor, and your judgment factor, is that correct?**
>
> **Mr. White: Yes, sir.**

[Emphasis added.]

The Chairman: Mr. Key, you know we are not going to admit anything except one hundred percent assessment (Tr. pp. 5-6).

It is not necessary, however, to determine whether or not the Commission assessed the plaintiff's property at actual cash value, since a final, equalized assessment of even 55% (which is the lowest assessment claimed by the defendants) is substantially higher than the average assessment percentage of locally assessed property, either state-wide or in the 54 counties through which plaintiff operates. By referring to the Tennessee Taxpayers Association Report in Appendix "C," and calculating the average assessment ratio of the 54 counties through which the plaintiff operates, it appears that the locally assessed properties in those counties are assessed at an average of approximately 20% of actual cash value. Thus, even on the basis of defendants' contention that plaintiff's property is assessed at only 55 to 65% of actual cash value, there would be a discrimination against plaintiff's property and in favor of locally assessed property of 35 to 45% in the counties through which plaintiff operates. If, on the other hand, the Court were to agree with plaintiff that its property had been assessed at full cash value by the Public Service Commission, then, taking into account the fact that the State Board of Equalization reduced the Commission's assessment by 5%, there would be a disparity in assessment ratios between the assessment of plaintiff's property and locally assessed property in the counties through which plaintiff operates of 75%. Under either approach, there exists in the challenged assessment a clearly invidious discrimination which is systematic, intentional, and of long-standing.

Nashville, Chattanooga & St. L. Ry. v. Browning, 310 U. S. 362 (1940) involved almost identical facts and constitutional claims. The case arose under Tennessee's 1932 Code, § 1526 [now 67-911] which made it the duty of

[Emphasis added.]

the railroad and public utilities commission [now the Public Service Commission] to assess all railroad property at its "actual cash value." The Commission so assessed the railroad's property, and the railroad appealed to the State Board of Equalization on the ground that all property not assessed by the Commission was assessed at substantially less than actual cash value in violation of Code 1932, § 1349 [now 70-605]. The Board confirmed the Commission's assessment, and the railroad then brought suit in the Circuit Court for Davidson County to have the action of the Board reviewed. The trial judge dismissed the petition and the railroad appealed to the Supreme Court of Tennessee. That Court found that the railroad's evidence did not overcome the presumption that the State Board had equalized all property at its actual cash value, and on this ground affirmed the trial court's dismissal. The railroad then petitioned the Supreme Court of the United States for certiorari, which was granted. The Court first dismissed the railroad's commerce clause claim. The claim was based on the fact that the Commission's assessment was arrived at by determining the value of the railroad's property in all states, and taking a percentage of that value, which represented the ratio of the railroad's track mileage in Tennessee to its total track mileage, as the value of the railroad's property in Tennessee. In the present case, however, the commerce clause claim is quite different. The railroad contends that the amount of taxes paid in Tennessee is much higher than the amount of taxes paid in other states and is, indeed, so much higher as to restrain interstate commerce. The railroad, however, does not allege or contend that its properties are being taxed any higher than purely intrastate railroads or intrastate utilities, and for this reason the railroad's commerce clause objection is without merit.

In Browning, the Court denied the railroad's equal protection claim under the Fouprteenth Amendment on the

ground that the evidence before the Court did not warrant the overturning of the express finding of the Supreme Court of Tennessee that the railroad had not proved discrimination. There was nothing in the record before the Court to indicate that the Tennessee State Board of Equalization had not equalized all property within the state at its actual cash value, and the Court, therefore, accepted the express finding of fact of the Supreme Court of Tennessee on this issue. If that were all the Court had to say on the railroad's Fourteenth Amendment claim, the case would not be of any concern in the present litigation since we have before us no such finding of fact by the Tennessee Supreme Court, but instead, conclusive evidence to the contrary. The Court proceeded, however, to consider the railroad's equal protection claim as if the State Supreme Court had found that the railroad was, in fact, treated differently for tax purposes from the majority of property owners in the state. Since this latter consideration was clearly unnecessary to the decision of the case, it would appear that the Supreme Court's discussion concerning it may be regarded as dicta. Nevertheless, the words of the Supreme Court, though dicta, should be respected and followed by this Court unless there are compelling reasons to believe that the Supreme Court itself would not apply such dicta to the facts of this case. The Court is of the opinion that such compelling reasons do exist, and that the Supreme Court on the basis of the present record, and in the light of the unambiguous provisions of the Tennessee Constitution and statutes, as well as the authoritative rulings of its highest court, would not follow the manifestly erroneous conclusion that state law permitted or allowed classifications of property for tax purposes.

Basically, the Court in Browning reasoned as follows: the states have the power to establish different classes of property for tax purposes; if such classes are reasonable

different treatment for taxpayers in different tax classes raises no equal protection problem; if railroads and utilities were placed by the states into one class and all other property into another class, such a classification would be reasonable; therefore, since "so far as the Federal Constitution is concerned, as state **can** put railroad property into one pigeonhole and other property into another, **the only question relevant for us is whether the state has done so**" (p. 369, emphasis supplied). This question is relevant because the Fourteenth Amendment commands equality of treatment unless the state has established different and reasonable classes of property. In the absence of classification by the state, there is no federal classification which would permit different tax treatment for railroads. With this reasoning, no one can argue. The difficulty with the Browning opinion lies in its finding that state law had, in fact, established different classes of property. It is beyond question that both now and at the time of the Browning decision, the Tennessee Constitution expressly prohibits the classification of property for tax purposes. (See Appendix "A".) It is equally clear that both now and at the time of the Browning decision, the Tennessee statutes, with criminal sanctions, in terms admitting of no doubt or uncertainty, prohibit the classification of property for tax purposes, or the valuation of any property at less than its actual cash value. (See Appendix "B".) The Supreme Court made no specific reference to these explicit constitutional and statutory provisions, stating that a "practice, systematic, unbroken for more than forty years," of treating railroads and utilities differently from other properties, demonstrated that state "law" provided for the classification. The Supreme Court looked at this "settled state practice" as a "gloss" upon the state statutes, and, inferentially, as a gloss upon the state constitution. In traditional jurisprudence, such a gloss is relied upon to construe state law only if the state constitu-

tion or the state statutes are ambiguous, which the Tennessee Constitution and statutes admittedly are not. Still, even if we should assume that the State Constitution and statutes are ambiguous, state practice can be relied upon as a gloss only if there is no judicial determination of the meaning of the State Constitution and statutes by the state courts, for the reason that the state's highest court, not the United States Supreme Court, is the final authority with respect to what is, and what is not, state law. Browning, then, should fairly be regarded as having been based upon the assumption that the Tennessee law on the question of classification of property for tax purposes was not clear, or had not been authoritatively settled by the State's Supreme Court. Indeed, the Supreme Court did not cite a single state court decision. The Court's principal reference to the state courts was as follows: "If the state supreme court **had** construed the requirement of uniformity in the Tennessee Constitution so as to **permit** recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment" (p. 369, emphasis supplied). In fact, however, the State Supreme Court long before Browning had construed the requirement of uniformity in the Tennessee Constitution as expressly prohibiting the under-assessment or under-taxation of any type or species of property, a decision from which it has never deviated.

Carroll v. Alsup, 107 Tenn. 257 (1901), did not involve a Public Service Commission assessment but it demonstrates conclusively that state law requires that for assessment and taxing purposes all property within the state shall be treated as a single class; that all property shall be assessed at actual cash value; and that all taxes shall be equal and uniform:

> There are, then, two fundamental principles to be taken as guides in assessing property under our Con-

stitution and laws: (1) That **all property** shall be assessed at its actual cash value; and (2) that taxes shall be equal and uniform. . . . However difficult it may be to arrive at the first result, it is **imperatively demanded by the Constitution and laws**, and the second unavoidably and from necessity follows it, and to adopt a cash valuation is the only basis upon which it is practicable to make taxes equal and uniform (p. 283, emphasis supplied).

. . . The recourse offered to the taxpayer is not to reduce his own assessment, unless it is beyond its actual cash value, but to have that of his neighbor increased until **both** reach the point of actual cash value and thus become equal and uniform, as **the law provides and the Constitution contemplates.** This idea is manifested in many provisions of the statute not necessary to be specifically pointed out. It may be found in every section that refers to value (p. 284, emphasis supplied).

. . . We will not stop to comment on these cases further than to say that the doctrine of assessment and taxation upon a percentage of value instead of true value or actual cash value finds no warrant in the language used in the Reelfoot Lake case (p. 289).

. . . But it by no means warrants the idea that a percentage of value may be made the basis of assessment, but, on the contrary, the "actual value," or "true value," or "cash value," the expressions being synonymous, are made the basis by which the tax or value must be graduated or determined (pp. 289-90).

It was evidently the purpose of the General Assembly in the Act of 1899, to escape the percentage valuation idea **as to any and every kind of taxable property**, and fix upon the actual cash value as the basis upon which all assessments should be made so as to meet **both requirements of the Constitution**, the assessment of property at its value, and at the same

time taxation should be equal and uniform. The Constitution of 1870, Art. 2, Sec. 28, directs that **all property** shall be taxed according to value, that value, to be ascertained in such manner as the Legislature may direct, so that taxes shall be equal and uniform throughout the State, and so that **no species of property** from which a tax may be collected **shall be taxed heavier than any other species of property of the same value** (p. 290, emphasis supplied).

. . . under our system there is but one basis upon which values can be made finally to rest, and that is the actual cash value, and until that is reached no property is free from the machinery of the law designed to place it on that basis (p. 291).

. . . and in this way the Courts, Legislatures and taxpayers will co-operate to tax **all property** at its actual cash value and to make all taxes equal and uniform, **as the Constitution contemplates.** The actual cash value is the only practicable basis upon which taxes can be made equal and uniform, and this is **clearly the constitutional requirement, the legislative intent,** and should be the effort of the Court as well as taxpayers (p. 292, emphasis supplied).

And in City of Chattanooga v. Railroad Co., 75 Tenn. 438 (7 Lea 561, 1881), the Court stated:

It is clear from the provisions quoted, that the limitations upon the exercise of the taxing power in reference to all property in our State are, that all property be taxed according to its value, so that taxes shall be equal and uniform throughout the State, and "no one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value" (p. 566, Lea).

. . . and it must be equal and uniform throughout the State, and the assessment so made that no one species of property shall be taxed higher than any

> other species of the same value. The principle on which the value is ascertained, must necessarily be the same in order to this result. There can be no variable amount demanded or fixed on this value for the whole State, nor in any defined division or territory, as a county or incorporated town, having the power to levy taxes. Such taxes must be levied on the same principle as that prescribed for State taxation . . . (p. 567, Lea).
>
> . . . we know of no constitutional principle on which railroad property of this character can be valued by a different rule from that of other citizens (pp. 574-75, Lea).

Similary, in Brown v. Greer, 40 Tenn. 528 (3 Head 695, 1859), the Court stated:

> In this case, from the description of slaves, it is clear that they are not assessed at much more than half their cash value. This is a great abuse and ought to be reformed. All property ought to be assessed at their fair value, and that can only be determined by the ordinary selling and buying prices for cash, at the time. To place it any lower than this standard is a palpable dereliction of duty on the part of those whose duty it is made by law to value it, and it is difficult to see how the district or town assessors can reconcile their practice in this respect to their duty, enforced by a solemn oath (pp. 696-97, Head).

See also, the similar interpretation of state law by the Court of Appeals for this Circuit in Taylor v. Louisville & Nashville R. Co., 88 F. 350 (6th Cir., 1898), which the Supreme Court in Browning did not cite or attempt to distinguish.

The Tennessee Supreme Court in decisions subsequent to Browning has not departed from the ruling in Carroll v.

Alsup that the Tennessee Constitution and statutes require all property to be assessed at actual cash value. See, e. g., McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S. W. 2d 196 (1948); Mayor and Aldermen of the Town of Morristown v. Burke, 207 Tenn. 180, 338 S. W. 2d 593 (1960); and Biltmore Hotel Court v. City of Berry Hill, ... Tenn. ..., 390 S. W. 2d 223 (1965).

The Court is thus confronted with this situation:

The United States Supreme Court, relying solely on a state administrative practice, has stated (although in dicta) that the "law" of Tennessee recognizes different classes of property for tax purposes. On the other hand, the Supreme Court of Tennessee has ruled without exception that the assessment of any property at less than actual cash value is a direct violation of the State Constitution and statutes, which expressly prohibit classification of property for tax purposes. Under these facts, it seems clear that the duty of this Court is not to be guided by the comments of the Supreme Court of the United States as to what the law of Tennessee is, but rather to accept the pronouncements of the highest court of Tennessee, and the unambiguous provisions of that state's constitution and statutes, that any difference in the assessment of railroad and utility property, in relation to other properties, is a flagrant violation of state law. This is especially true in a case where such comments may properly be regarded as dicta, and where the highest court of Tennessee in decisions after the Supreme Court's comments, has made no departure from its own interpretation of state law. Any other ruling in this case would mean that a federal court would be required to accept as the law of the state, not the authoritative rulings of its Supreme Court, but the admittedly conflicting practice of state administrative agencies.

In Tennessee, therefore, there is, for tax purposes, but one class of property, as its laws so emphatically provide.

Since the Fourteenth Amendment clearly prohibits unequal treatment within a class, the substantially and systematically higher assessment percentages for railroad and utility property, as opposed to other properties, is a violation of the equal protection clause of the Fourteenth Amendment, and entitles the plaintiff to relief. Sioux City Bridge v. Dakota County, 260 U. S. 441, 446 (1923):

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

In Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352-53 (1918), the Court ruled:

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute **or by its improper execution** through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property (emphasis supplied).

Lower federal courts have reached the same results. See, for example, Wyandotte Chemical Corp. v. City of Wyandotte, 199 F. Supp. 582, 584 (E. D. Mich. 1961) (rev'd on sole ground that Michigan law provided an adequate remedy, 321 F. 2d 927 (6th Cir., 1963)):

> Improper execution of the laws through duly constituted agents, which results in arbitrary discrimination of taxable property in the same class, as defined by state law, and thereby taking property without due process of law and failing to give it the equal protection of the law, constitutes a federal question beyond all controversy [citing cases].
>
> It should be pointed out that this court is inclined to agree with the defendants that industrial property could reasonably be classified separately and assessed under a different method while conforming to the dictates of equal protection of the laws [citing Browning]. However, when the Constitution prohibits such a separate classification, and the statutes do not permit it, and the State Tax Commission has allegedly recognized the requirement of equal treatment, it cannot be said that "settled state practice" has established state law of separate classifications.

And see, In re Chicago Rys. Co., 175 F. 2d 282 (7th Cir., 1949); Louisville & Nashville R. Co. v. Bosworth, 230 F. 191 (E. D. Ky., 1915); (This case was modified sub. nom. Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522 (1917), which affirmed the lower court's finding that the railroad was entitled to relief, but which reversed on the ground that the railroad might be entitled to greater relief than that granted by the lower court.); and Delaware, Lackawanna and Western R. Co. v. Kingsley, 189 F. Supp. 39 (D. C. N. J., 1960) (distinguishing Browning on the ground that the New Jersey Constitution and statutes do not classify property for tax purposes. Of course, neither do the Constitution and statutes of Tennessee, which points up the difficulties of the Browning dicta).

. . . The defendants, opposing the relief sought by the plaintiff, contend that the Court may not "enjoin, suspend or restrain the assessment, levy or collection of any tax

under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. A. § 1341.

Plaintiff's allegation that state remedies are not plain, speedy or efficient is denied by defendants on the ground that there are at least three ways in which the plaintiff's complaint can be brought before the state courts—in a suit for tax refund after payment, by certiorari to the Davidson County Circuit Court, and by suits in equity to enjoin the assessment as the basis for local taxes. It is clear, however, that even though the plaintiff theoretically could pursue these procedural avenues in the state courts, state law would bar relief to the plaintiff unless the plaintiff could prove that it has been assessed at more than actual cash value, which of course it cannot do. Even if plaintiff were assessed at more than actual cash value, state law would prohibit any reduction in plaintiff's assessment, and would only permit the assessments of all other taxpayers to be increased. Carroll v. Alsup, 107 Tenn. 257 (1901); McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S. W. 2d 196 (1948); Mayor and Aldermen of the Town of Morristown v. Burke, 207 Tenn. 180, 338 S. W. 2d 593 (1960); and Biltmore Hotel Court v. City of Berry Hill, ... Tenn. ..., 390 S. W. 2d 223 (1965). Defendants admitted at the hearing that, unless the Supreme Court of Tennessee were to reconsider its prior holdings, the plaintiff would not be entitled in the state courts to the relief it now seeks. The Supreme Court of the United States has ruled in an analogous situation that a remedy such as that provided in the courts of Tennessee is, in effect, no remedy at all, and is certainly not sufficiently plain, speedy and efficient to bar federal equity relief. Township of Hillsborough v. Cromwell, 326 U. S. 620, 624 (1946) (suit for declaratory judgment, but adequacy of state remedies analyzed in terms of suit for an injunction); Sioux City Bridge v. Dakota County, 260

U. S. 441, 446 (1923); and Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499 (1917) . . . Furthermore, in a suit strikingly similar to the present, the Sixth Circuit has affirmed a District Court injunction and has sustained federal equity jurisdiction in order to prevent a multiplicity of suits and in order to remove a cloud from plaintiff's property in Tennessee. Taylor v. Louisville & N. R. Co., 88 F. 350 (6th Cir., 1898). Taylor was a diversity case decided before Erie, and it may not today be controlling in a suit based solely on diversity, but it is significant to note that the Court at that time held that Tennessee law prohibited classification of property for assessment purposes, a decision contrary to the Supreme Court's intimation in Browning that the type of classification involved in this case was never "questioned" before the Browning case. As we have seen, that is still the law in Tennessee, and since there is no plain, speedy, and efficient remedy in Tennessee to correct the intentional and systematic violations of either its own law or of the Fourteenth Amendment, federal declaratory and injunctive relief is not only proper but necessary for the protection of plaintiff's constitutional rights. The defendants' abstention argument has been considered by the Court. But in view of the settled state rule, the Court is persuaded that any appeal to the state courts would be in vain.

The Court is aware of the impact of the present decision upon the tax structure of the state and its subdivisions, since the type of discriminatory treatment here involved is deep-seated and of long-standing and many governmental programs have been patterned accordingly. Realizing the possibility that a ruling in its favor could have serious disruptive effects throughout the state, the plaintiff, in open court, offered to accept the assessment of $74,865,850.00, as determined by the State Board of Equalization, less a reduction of 15%, for the current

tax biennium, without prejudice to its rights as to future tax years, and without prejudice to its insistence that the discrimination against it is represented by a much higher percentage. The defendants have made no response to this offer. In any event, it does not appear that the Court should undertake to decree or enforce any particular reduction in the plaintiff's assessment or to determine what the assessment should be to eliminate the existing discrimination against the plaintiff. At least in the first instance, this is a task for the State Equalization Board, acting in such way as to remove from the existing assessment any invidious discrimination, with a minimum of disruption to the revenues of the state and its subdivisions. Wyandotte Chemical Corp. v. City of Wyandotte, 321 F. 2d 927, 931 (6th Cir., 1963), quoting from Helmsley v. City of Detroit, Michigan, 330 F. 2d 476 (6th Cir., 1963).

A form of judgment will be submitted declaring the rights of the plaintiff consistently with this opinion, and enjoining the defendants from certifying or enforcing the challenged assessment of plaintiff's property, without prejudice to the right of the State Board of Equalization to rehear and reconsider the assessment so that it may be made to conform with the requirements of equal protection of the law under the Fourteenth Amendment. Pending such re-determination, the case will be retained on the active docket, with either party having the right to apply to the Court at any time for other or additional orders.

/s/ William E. Miller,
United States District Judge.

(Appendices Omitted.)

[Emphasis added.]